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THE

# ONTARIO REPORTS.

VOLUME XXI.

CONTAINING

REPORTS OF CASES DECIDED IN THE QUEEN'S  
BENCH, CHANCERY, AND COMMON  
PLEAS DIVISIONS

OF THE

# HIGH COURT OF JUSTICE FOR ONTARIO.

WITH A TABLE OF THE NAMES OF CASES ARGUED,  
A TABLE OF THE NAMES OF CASES CITED,  
AND A DIGEST OF THE PRINCIPAL MATTERS.

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TORONTO:

ROWSELL & HUTCHISON,

KING STREET EAST.

1892.



ENTERED according to the Act of Parliament of Canada, in the year of our Lord one thousand eight hundred and ninety-two, by THE LAW SOCIETY OF UPPER CANADA, in the Office of the Minister of Agriculture.



JUDGES  
OF THE  
HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

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## A TABLE

OF THE

## CASES REPORTED IN THIS VOLUME.

A.	Page	B.	Page
Acme Silver Co. v. Stacey Hardware, etc., Co .....	261	Bank of Ottawa v. Wade .....	486
Ætna Life Insurance Co., Bain v. ....	233	Beatty v. Rumble et al .....	184
Aldous v. Hicks et al. ....	95	Bedere, Regina v. ....	189
Aldrich v. Aldrich .....	447	Bell, Fraser and, Re .....	455
Alger and Sarnia Oil Co., Re. .	440	Biette et al. Elliott v., Re ....	595
Allen v. Fairfax Cheese Co ...	598	Birkett, Regina ex rel. McGuire v .....	162
Allin, Lillie and, Re .....	424	Bittle, Regina v .....	605
Anderton, In re Corporation of the township of, and Corporation of the township of Colchester North .....	476	Black et al., Murray et al. v. .	372
Archibald et al., Humphrey v. ....	553	Booth and McLean, Re .....	452
Ardill, Bowey v., Re Bowie ...	361	Bowey, Re, Bowey v. Ardill. .	361
Armstrong et al., Auger v. ....	98	Brantford, License Commissioners of the city of, McGill v. ....	665
Arthur, Trustees of Roman Catholic School Section No. 10 of the township of, v. The Municipal Corporation of the township of Arthur .....	60	Bricker et al. v. Campbell. ....	204
Ashfield v. Edgell et al .....	195	Brooke v. Toronto Belt Line R. W. Co. ....	401
Attorney-General ex rel. Russell et al. and the Vaughan Road Co .....	507	Brown, Wansley and, Re ....	34
Auger, Armstrong et al. v. ....	98	Bucke, Ross v. ....	692
B.		Bunnell, Pratt v. ....	1
Bain v. Ætna Life Insurance Co .....	233	Burfoot v. DuMoulin. ....	583
Bank of British North America v. Gibson et al. ....	613	Burns et al. v. Davidson et al. ....	547
		C.	
		Cameron, Re, Mason v. Cameron. ....	634
		Campbell, Bricker et al. v. ....	204
		Canadian Pacific R. W. Co. et al. Delaney v .....	11
		Canadian Pacific R. W. Co., Duncan v. ....	355

C.	Page	D.	Page
Canadian Pacific R. W. Co., Hollinger v. ....	705	Dame v. Slater et al. ....	375
Caradoc, Corporation of the township of, v. Corporation of the township of Medcalfe.	309	Davidson et al., Burns et al. v.	547
Carmichael, Rogers et al. v. ...	658	Davies et al. v. Gillard et al. ...	431
Central Bank, Re, Canada Ship- ping Companies' Case. ....	515	Davis, Stevenson et al. v. ....	642
City of Toronto, Cribbin and	325	Davis and City of Toronto. .	243
City of Toronto, Davis and. .	243	Deans, McArthur Brothers Co. (Limited) v. ....	380
Clark, McLean v. ....	683	Delaney v. Canadian Pacific R. W. Co., et al. ....	11
Clarkson, Thompson v. ....	421	Donovan et al., Roberts v. ....	535
Clemens, Ellis v. ....	227	DuMoulin, Burfoot v. ....	583
Coe v. Coe, Re. ....	409	Duncan v. Canadian Pacific R. W. Co. ....	355
Coffin v. North American Land Co. et al. ....	80	Dwyer and Town of Port Ar- thur. ....	175
Colchester North, Corporation of, Corporation of the town- ship of Anderdon and, Re. .	476	E.	
Cole, Tipling v., Re. ....	276	Edgell et al., Ashfield v. ....	195
Cormack, Regina v. ....	213	Elborne, Regina v. ....	504
Corporation of the township of Metcalf, Corporation of the township of Caradoc v. ....	309	Elliott v. Biette et al., Re ....	595
Corporation of Smith's Falls, Vernon v. ....	331	Ellis v. Clemens. ....	227
Corporation of the City of To- ronto, Gooderham et al. v. ...	120	Elmsley, Hayes v. ....	562
Corporation of the township of Anderdon and Corporation of the township of Colchester North, Re. ....	476	Essery v. Grand Trunk R. W. Co. ....	224
Corporation of the township of Arthur, Trustees of Roman Catholic Separate School Sec- tion No. 10 of the township of Arthur v. ....	60	Essex Land and Timber Co., Re, ....	367
Corporation of the township of Caradoc v. Corporation of the township of Metcalfe ....	309	F.	
Cosby, Regina v. ....	591	Fairfax Cheese Co., Allen v. ...	598
Crewson et al., Lasby et al. v. 93,	255	Farmer v. Grand Trunk R. W. Co. ....	299
Cribbin and City of Toronto, Re. ....	325	Fraser and Bell, Re. ....	455
		Frontenac Loan and Invest- ment Society v. Hyslop et al.	577
		G.	
		G——. Re. ....	109
		Garbutt, Re. ....	179, 465
		Gault et al. v. Murray et al. .	458
		Gibbons v. Tomlinson. ....	489
		Gibson et al., Bank of British North America v. ....	613

## G.

	Page
Gibson, Moot v. ....	248
Gillard et al., Davies et al. v. . .	431
Gooderham et al. v. Corpora- tion of the city of Toronto.	120
Gould v. Hope, Re .....	624
Grand Trunk R. W. Co., Essery v .....	224
Grand Trunk R. W. Co., Far- mer v .....	299
Grand Trunk R. W. Co., Zim- mer v .....	628
Gully, Regina v .....	219
Gurr, Regina v .....	499

## H.

Hagar v. O'Neill et al .....	27
Hayes v. Elmsley .....	562
Harris, Robinson v. ....	43
Henry, Regina v. ....	113
Hessin v. Lloyd, Re North Perth .....	538
Hicks et al., Aldous v .....	95
Hollinger v. Canadian Pacific R. W. Co. ....	705
Hope, Gould v., Re. ....	624
Humphrey v. Archibald et al.	553
Hutchinson, Martin v .....	388
Hyslop et al., Frontenac Loan and Investment Society v. .	577

## L.

Lasby et al. v. Crewson et al.	93, 255
License Commissioners of the city of Brantford, McGill v.	665
Lillie and Allin, Re .....	424
Lister, Mitchell v .....	22, 318
Lloyd, Hessin v., Re North Perth .....	538
London and Lancashire Fire Ins. Co., Stoot v .....	312

## L.

	Page
Loney v. Oliver .....	89
Lonsdale et al., Robertson et al. v .....	600

## M.

Marsh et al. v. Webb et al. . .	281
Martin v. Hutchinson .....	388
Martin v. McKay, Re. ....	104
Mason, Cameron v., Re Cameron	634
Metcalfe, Corporation of the township of, Corporation of the township of Caradoc v.	309
Mingeaud v. Packer et al. ....	267
Mitchell v. Lister .....	22, 318
Moot v. Gibson .....	248
Murray et al v. Black et al. . .	372
Murray et al., Gault et al. v. .	458

## Mc.

McArthur Brothers Co. (Limit- ed) v. Deans .....	380
McCord's Case, Re Union Fire Ins. Co. ....	264
McGill v. License Commission- ers of the city of Brantford	665
McGugan v. McGugan et al. . .	289
McKay, Martin v., Re. ....	104
McLean, Booth and, Re. ....	452
McLean v. Clark. ....	683
McLean, Patterson v. ....	221
McPhee, McPherson v., Re, 280,	411
McPherson v. McPhee, Re, 280,	411

## N.

Neville, Sweetland v. ....	412
Neville, Union Bank v. ....	152
North American Land Co, et al., Coffin v. ....	80
North Perth, Re, Hessin v. Lloyd	538



## O.

	Page
Oliver, Loney v.....	89
O'Neill et al., Hagar v .....	27
Ontario Bank, Rogers v .....	416
Owen Sound Dry Dock Ship- building and Navigation Co. (Limited), Re .....	349

## P.

Packer et al., Mingeaud v.....	267
Patterson v. McLean .....	221
Port Arthur, Town of, Dwyer and .....	175
Pratt v. Bunnell .....	1

## R.

Regina v. Bedere .....	189
Regina v. Bittle .....	605
Regina v. Cormack.....	213
Regina v. Cosby .....	591
Regina v. Elborne .....	504
Regina v. Gully .....	219
Regina v. Gurr .....	499
Regina v. Henry.....	113
Regina ex rel. McGuire v. Bir- kett .....	162
Regina v. Southwick.....	670
Regina v. Stapleton .....	679
Regina v. Westgate .....	621
Regina v. Westlake .....	619
Roberts v. Donovan et al .....	535
Robertson et al. v. Lonsdale et al .....	600
Robinson v. Harris.....	43
Rogers et al. v. Carmichael ..	658
Rogers v. Ontario Bank.....	416
Ross v. Bucke .....	692
Rumble et al., Beatty v.....	184

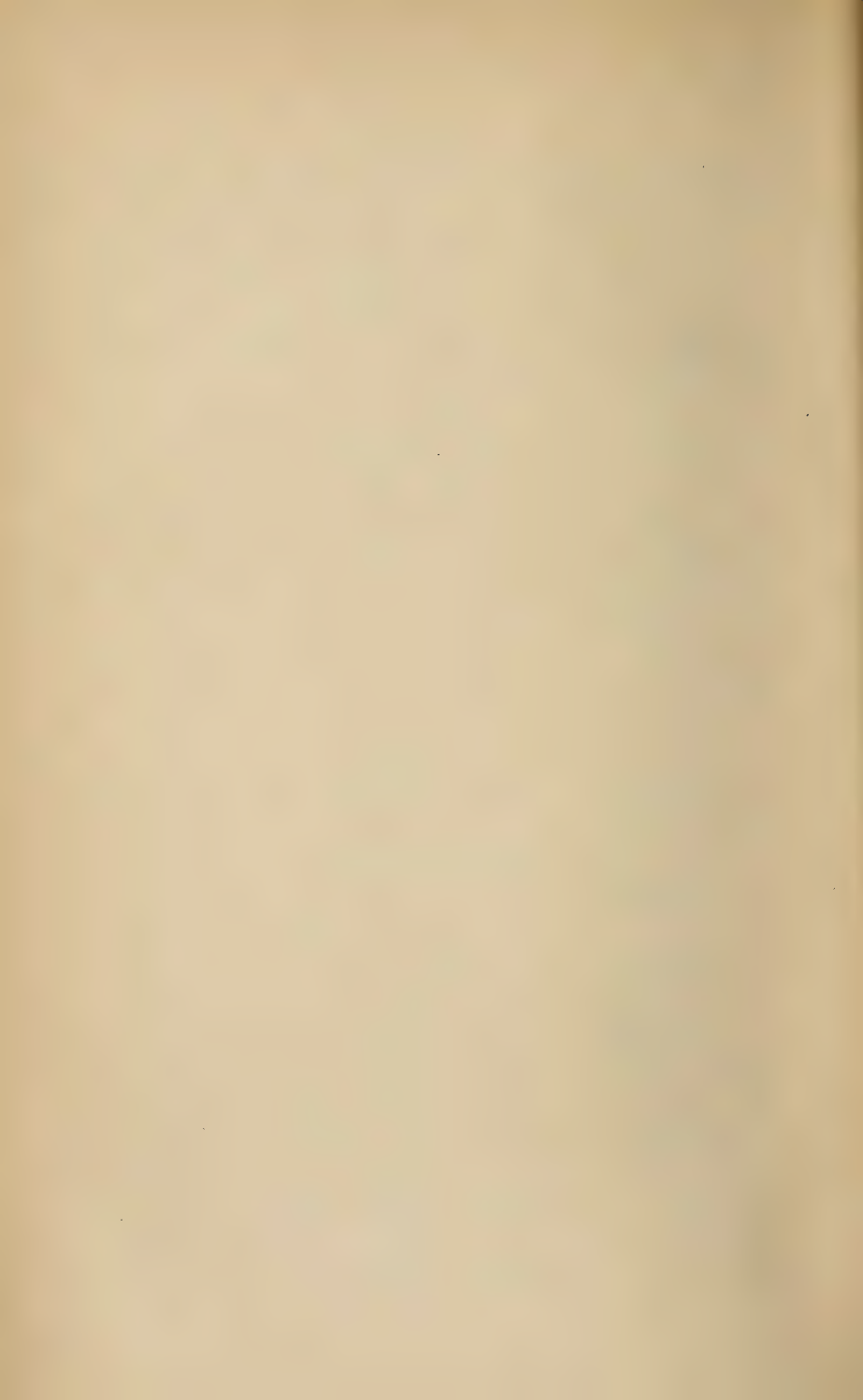
## S.

	Page
Sarnia Oil Co., Alger and, Re..	440
Scottish Ontario and Manitoba Land Co., Re .....	676
Shore v. Shore .....	54
Skain et al., Wallis v.....	532
Slater et al., Dame v .....	375
Smith's Falls, Corporation of, Vernon v .....	331
Southwick, Regina v.....	670
Springer, Tillie v .....	585
Stacey Hardware, etc., Co., Acme Silver Co. v .....	261
Stapleton, Regina v .....	679
Stevenson et al. v. Davis ....	642
Stevenson et al., Trust and Loan Company of Canada v.	571
Stoot v. London and Lanca- shire Fire Ins. Co .....	312
Sweetland v. Neville .....	412

## T.

Taillifer v. Taillifer .....	337
Thompson v. Clarkson .....	421
Tillie v. Springer .....	585
Tipling v. Cole, Re.....	276
Tomlinson, Gibbons v .....	489
Toronto Belt Line R. W. Co., Brooke v .....	401
Toronto, City of, Cribbin and.	325
Toronto, City of, Davis and ..	243
Toronto, Corporation of the City of, Gooderham et al. v.	120
Town of Port Arthur, Dwyer and .....	175
Trust and Loan Company of Canada v. Stevenson et al..	571
Trustees of Roman Catholic Separate School Section No. 10 of Arthur v. Municipal Corporation of the township of Arthur.....	60

U.		W.	
	Page		Page
Union Bank v. Neville . . . . .	152	Wade v. Bank of Ottawa, Re...	486
Union Fire Ins. Co., Re., Mc-		Wallis v. Skain et al . . . . .	532
Cord's Case . . . . .	264	Wansley and Brown, Re . . . .	34
		Watson's Trusts, Re . . . . .	528
		Webb et al., Marsh et al. v. . .	281
		Westgate, Regina v . . . . .	621
		Westlake, Regina v . . . . .	619
V.		Z.	
Vaughan Road Company, At-		Zimmer v. Grand Trunk R. W.	
torney-General ex rel. Rus-		Co. . . . .	628
sell et al. and . . . . .	507		
Vernon v. Corporation of			
Smith's Falls . . . . .	331		





# TABLE

OF THE

## NAMES OF CASES CITED IN THIS VOLUME.

### A.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Abrath v. North-Eastern R. W. Co....	11 App. Cas. 247 .....	394, 554
Adams v. Clutterbuck .....	10 Q. B. D. 403 .....	341
Adams v. Coleridge .....	1 Times L. R. 84.....	695, 698, 699
Addleston Linoleum Co., Re.....	37 Ch. D. 191 .....	351
Adone & Tobit v. Seeligson & Co.....	54 Tex. 593 .....	526
Agency Co. v. Short .....	13 App. Cas. 793 .....	19, 88
Airey v. Mitchell .....	21 Gr. 513 .....	16
Aitcheson v. Mann.....	9 P. R. 473 .....	177
Aldous v. Cornwell.....	L. R. 3 Q. B. 573 .....	646
Aldous v. Hicks .....	21 O. R. 95 .....	575, 581
Alderson v. Maddison.....	7 Q. B. D. 748, 8 App. Cas. 467..	340, 341
Allan v. McTavish.....	2 A. R. 278 .....	19
Allen v. Sharp.....	2 Exch. 160 .....	70
Almada and Tiritto Co., Re.....	38 Ch. D. 415 .....	351
Amann v. Damm .....	8 C. B. N. S. 597 .....	702
Amie's Estate, Re, Milner v. Milner....	W. N. 1880, p. 16 .....	379
Anderson v. Clark .....	2 Bing. 20 .....	526
Anderson v. Fitzgerald.....	4 H. L. Cas. 484 .....	317
Anderson v. Hamilton .....	2 B. & B. 157 .....	560
Anderson v. Muskoka Mill & Lumber Co.	13 O. R. 343 .....	387
Anderson v. Wellington.....	19 Pac. R. 719 .....	327
Andrews v. Crossley .....	W. N. January 16, 1892, p. 1 ..	525 note
Angus v. Angus .....	West Cas. temp. Hardwicke 23 ..	551
Anstruther v. Adair .....	2 M. & K. 513 .....	339, 346
Archbold v. Building & L. A .....	16 A. R. 1 .....	96
Arkell and Corporation of St. Thomas, Re .....	38 U. C. R. 594 .....	667
Arglasse v. Muschamp .....	1 Vern. 75 .....	548
Argus Company v. Mayor, etc., of Albany.	55 N. Y. 495 .....	332
Athenæum Life Assurance Society v. Pooley .....	3 De G. & J. 294 .....	222
Attorney-General of Canada v. Attorney- General of Ontario.....	19 A. R. 31 .....	611
Attorney-General v. Briant .....	15 M. & W. 171.....	555, 557, 561
Attorney-General v. Columbine.....	Cited in Boyle's Law of Charities, 204.....	36
Attorney-General v. Gaskill.....	20 Ch. D. 519.....	555
Attorney-General v. Great Eastern R. W. Co .....	17 Ch. D. 449; 5 App. Cas. 473....	234
Attorney-General v. Jeffrey.....	10 Gr. 273.....	34, 35, 39
Attorney-General v. Niagara Bridge Co.	20 Gr. 34 .....	508

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Attorney-General v. Niagara Falls, etc., Tramway Co. ....	19 O. R. 624 .....	508
Attorney-General v. Weston Plank Road	4 Gr. 211 .....	508, 513
Austin v. Davis .....	6 A. R. 478 .....	186
A. W. Hall Co., Limited, Re .....	37 Ch. D. 712 .....	354
Ayerst v. McClean .....	14 P. R. 15 .....	3, 4

## B.

Backhouse v. Bright, Re .....	13 P. R. 117 .....	279, 596
Badgerow v. Grand Trunk R. W. Co. .	19 O. R. 191 .....	299, 306
Bagot v. Arnott .....	Ir. Rep. 2 Com. Law 1., (1886)	29, 30
Bailey v. Williamson .....	L. R. 8 Q. B. 118 .....	325, 327, 329
Bain v. Durand .....	1 App. Cas. 772 .....	420
Bain v. Fothergill .....	L. R. 7 H. L. 158 .....	564
Bain v. Sadler .....	L. R. 12 Eq., 570 .....	587
Baldwin v. Henderson .....	2 U. C. R. 388 .....	284
Ballard v. Marsden .....	14 Ch. D. 374 .....	587
Bancroft v. Bancroft .....	4 Sw. & Tr. 84 .....	451
Bank of British North America v. West- ern Assurance Co .....	11 P. R. 434 .....	584
Bank of British North America v. Clark- son .....	19 C. P. 182 .....	524
Bank of Hamilton v. John T. Noye Manufacturing Co .....	9 O. R. 631 .....	524
Bank of London v. Wallace .....	13 P. R. 176 .....	549
Bank of Ottawa v. McLaughlin .....	8 A. R. 543 .....	596
Bank of Toronto v. Perkins .....	8 S. C. R. 610 .....	524
Barber, Re .....	14 M. & W. 720, 289, 293, 295, 296,	298
Barham v. Earl of Thanet .....	3 M. & K. 624 .....	580
Barker v. City of Pittsburg .....	4 Barr. (Penn.) 49 .....	332
Barling v. Bishopp .....	29 Beav. 417 .....	116
Barlow v. Osborne .....	6 H. L. C. 556 .....	442, 443, 446
Bartlett, Re, Newman v. Hook .....	16 Ch. D. 561 .....	442
Barry v. Harding .....	1 Jo. & Lat. 485 .....	580
Bass, Ex parte .....	17 L. J. Ch. 219; 2 Phil. 562	289, 295, 296, 299
Batchelor, Re .....	L. R. 16 Eq. 483 .....	588
Beasley v. Cahill .....	2 U. C. R. 320 .....	284
Beatson v. Skene .....	5 H. & N. 838 .....	561
Bechtel v. Street .....	20 U. C. R. 15 .....	231
Beckett v. Grand Trunk R. W. Co. ....	8 O. R. 609; 13 A. R. 174, 302, 709,	711
Belcher, Ex parte .....	4 Dea. & Ch. 703 .....	420
Belleville Board of Trustees v. Granger .	25 Gr. 570 .....	79
Bennett v. Deacon .....	2 C. B. 628 .....	696, 702
Bent v. Young .....	9 Sim. 180 .....	549
Betsworth v. Betsworth .....	Sty. 10 .....	597
Bickerton v. Walker .....	31 Ch. D. 151 .....	222, 223
Bilbee v. London Brighton, etc., R. W. Co .....	18 C. B. N. S. 584 .....	714
Bingley v. Marshall .....	11 W. R. 1018; 2 N. R. 546 .....	462
Bishop of Toronto v. Cantwell .....	12 O. R. 607 .....	284
Blake v. Canadian Pacific R. W. Co. ....	17 O. R. 177 .....	709, 711
Blake v. Izard .....	16 W. R. 108 .....	200
Blake v. Pilfold .....	1 M. & Rob. 198 .....	555
Blakely v. Hall .....	21 C. P. 138 .....	369
Blandford v. Blandford .....	8 P. D. 20 .....	449
Bloomfield Peerage Case .....	2 D. & C. 344 .....	380
Bodger v. Nicholls .....	28 L. T. N. S. 441 .....	596

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Bolding v. Lane .....	1 DeG. J. & S. 122 .....	573
Boley v. McLean.....	41 U. C. R. 260.....	591, 592, 593
Bond v. Pittard.....	3 M. & W. 357.....	241
Bonner v. Lyon .....	38 W. R. 541.....	413
Booth v. Briscoe.....	2 Q. B. D. 496.....	209
Botterill v. Whitehead .....	41 L. T. N. S. 588.....	695
Boswell v. Pettigrew .....	7 P. R. 393 .....	626
Boulter v. Hamilton.....	15 C. P. 125 .....	284
Bourne v. Mason.....	1 Vent. 6 .....	252
Bousfield v. Lawford .....	1 De G. J. & Sm. 459 .....	586
Boustead and Warwick, Re. ....	12 O. R. 488.....	375, 377
Bowen v. Lewis .....	9 App. Cas. 890 .....	662
Bowry v. Bennet .....	1 Camp. 348.....	29
Boyd v. Johnston.....	19 O. R. 598.....	573, 575
Boyes, Re.....	13 O. R. 6.....	544
Bradley v. McIntosh.....	5 O. R. 227.....	560
Brady v. Walls.....	17 Gr. 699.....	375, 377
Breton's Estate, Re.....	17 Ch. D. 421.....	581
Brewer v. Broadwood.....	32 Ch. D. 105 .....	52, 53
Brewer v. Jacobs.....	22 Fed. R. 217 .....	393
Brice v. Bannister.....	3 Q. B. D. 569.....	615, 616, 618
Bridges v. Miller.....	20 Q. B. D. 287.....	429
Bridges v. North London R. W. Co.....	L. R. 7 H. L. 213 .....	306
Brine v. Bazalgette.....	3 Ex. 692 .....	700
British Columbia, etc. Co. v. Nettleship..	L. R. 3 C. P. 499.....	526
Brodie and Corporation of Bowmanville..	38 U. C. R. 580.....	667
Brodie v. Parry.....	2 V. & B. 131.....	340
Bronson and Ottawa, Re.....	1 O. R. 415.....	247
Broughton v. Corporation of Brantford..	19 C. P. 434 .....	332
Brown v. Bateman.....	L. R. 2 C. P. 272 .....	200, 201
Brown v. Hawkes.....	(1891) 2 Q. B. 718.....	704
Brown v. Kempton.....	19 L. J. C. P. 169.....	435
Browne, Re .....	6 A. R. 395.....	466, 468
Browne v. Brockville and Ottawa R. W. Co.....	20 U. C. R. 202.....	629
Browne v. Warnock.....	7 L. R. Ir. 3.....	110, 111
Bruce and Bruce.....	L. R. 11 Eq. 371 .....	56, 57, 58
Bruce v. Continental Life Ins. Co.....	58 Vt. 260 .....	236
Bryans v. Nix .....	4 M. & W. 775 .....	526
Buck v. Robinson .....	3 Q. B. D. 686.....	618
Buenos Ayres, etc., R. W. Co. v. Northern R. W. Co. of Buenos Ayres .....	2 Q. B. D. 210.....	548
Burford Case .....	18 O. R. 546 .....	77
Burke v. Taylor .....	46 U. C. R. 371 .....	417
Burleigh, Re.....	1 U. C. L. J. N. S. 46.....	467, 468
Burns v. Eddie .....	2 U. C. R. 286.....	284
Burroughes v. Bayne.....	4 H. & N. 296 .....	199
Burroughs v. Burroughs .....	2 Sw. & Tr. 303 .....	451
Burrowes, Re .....	18 C. P. 493 .....	279
Burrowes v. Cairns.....	2 U. C. R. 288.....	530
Bushell v. Bushell .....	1 Sch. & L. 90 .....	5
Bushnell v. Scott .....	21 Wis. 457.....	139
Butler v. Standard Fire Ins. Co.....	4 A. R. 398 .....	312
Byam v. Collins .....	46 S. C. N. Y. 204.....	695, 697, 698



## C.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Cæsar v. Municipality of Cartwright....	12 U. C. R. 341 .....	665, 669
Caffarini v. Walker .....	Ir. R. 9 C. L. 437 .....	564
Caldwell, Re .....	5 P. R. 217 .....	180, 466, 468, 469
Calvert v. Black .....	8 P. R. 225 .....	2
Calvo v. Davies .....	73 N. Y. 211 .....	96
Cameron v. Carter .....	9 O. R. 426 .....	102
Cameron v. Cusack .....	17 A. R. 489 .....	116
Cameron v. Milloy .....	14 C. P. 340 .....	429
Cameron v. Wait .....	3 A. R. 175 .....	177
Cameron v. Walker .....	19 O. R. 212 .....	81
Campbell v. National Life Ass. Co. ....	34 U. C. R. 35 .....	634
Campbell v. Robinson .....	27 Gr. 634 .....	575, 581
Campbell v. Royal Canadian Bank .....	19 Gr. 334 .....	4, 5
Canadian Bank of Commerce v. Marks..	19 O. R. 450 .....	602
Cannon v. Bryce.....	3 B. & Al. 179 .....	29
Carpenter v. Carpenter.....	Milw. R. 159 .....	448
Carr's Settled Estates, Re .....	9 W. R. 776 ; 7 Jur. N.S. 1267 ..	529, 531
Carteret v. Petty .....	2 Swanst. 323 Note .....	552
Casey v. Canadian Pacific R. W. Co....	15 O. R. 574 .....	709
Cecil v. Langdon.....	54 L. J. N. S. 418.....	531
Centre Wellington Election, Re.....	44 U. C. R. 132 .....	543, 545
Central Bank, Re—J. D. Henderson's Case .....	17 O. R. 110 .....	266
Chalmers v. Chalmers .....	6 Ct. of Sess. Cas. 547 (1868)....	451
Chamberlain v. Napier.....	15 Ch. D. 614 .....	340
Chamberlain Ex parte .....	2 Ch. Ch. 352 .....	377
Chambers v. Green .....	L. R. 20 Eq. 555 .....	540
Chantler v. Ince.....	7 Gr. 432 .....	102
Chaplin v Young .....	33 Beav. 330 .....	423
Chapman v. Gibson.....	3 B. C. C. 229 .....	56
Chapman v. Newell .....	14 P. R. 208.....	318, 320
Chatenay v. Brazilian, etc., Co .....	(1891) 1 Q. B. 79 .....	520
Cherry v. Boulton .....	2 Keen 319 .....	586
Chifferiel Re, Chifferiel v. Watson.....	40 Ch. D. 45 .....	564
Chinnock v. Marchioness of Ely.....	2 H. & M. 220 .....	566
City of Detroit v. Detroit & Milwaukee R. W. Co.....	23 Mich. 173 .....	145
City of Indianapolis v. Kingsburg.....	101 Ind. 200 .....	137, 148
Clark v. Molyneux .....	3 Q. B. D. 237.....	696, 704
Clarke v. Bradlaugh .....	8 Q. B. D. 69 .....	508
Clarke v. Palmerston .....	6 O. R. 616 .....	177
Clarke v. Stanford.....	L. R. 6 Q. B. 357 .....	502
Clarkson v. Scott.....	25 Gr. 373 .....	96, 579, 580, 581
Clarkson v. Severs.....	17 O. R. 592 .....	159
Cleator, Re.....	10 O. R. 330 .....	456
Climie v. Wood .....	L. R. 3 Ex. 257 .....	257
Clinck v. Ontario Loan and Investment Co.....	Holmstead & Langton, J. A. p. 654.	596
Coburn v. Great Northern R. W. Co....	8 Times L. R. 31 .....	711
Cockburn v. Muskoka Mills & Lumber Co .....	13 O. R. 111 .....	381
Coe v. Coe, Re.....	21 O. R. 409 .....	429
Coldwell v. Hall.....	9 Gr. 110 .....	21
Colehan v. Cooke .....	Willes 393 .....	215
Coleman v. Moore.....	44 U. C. R. 328 .....	35, 40
Commonwealth v. Bacon.....	6 Serg. & Rawle 322.....	332
Commonwealth v. Pomeroy .....	117 Mass. 143 .....	561

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Connecticut River R. W. Co. v. County Commissioners of Franklin.....	127 Mass. 50 .....	481
Consols Insurance Association, Re, Benham's Case .....	11 Jur. N. S. 381 .....	265
Cook v. Batchellor .....	3 B. & P. 150 .....	207
Cooper and Asprey .....	3 B. & S. 937 .....	187
Cooper v. Martin .....	L. R. 3 Ch. 47.....	56
Cooper, Ex parte.....	W. N. 24, June, 1882, p. 96.....	493
Cornwall v. Richardson .....	R. & Moo. 305 .....	700
Corporation of St. Vincent v. Greenfield.	12 O. R. 297, 15 A. R. 567 .....	143
Costello's Minors, Re, Ex parte Dillon..	2 J. & L. 244 .....	444
County Marine Insurance Co., Re, Rance's Case .....	L. R. 6 Ch. 104 .....	238
Court v. Walsh .....	1 O. R. 167 .....	16
Courtney v. Williams .....	3 Ha. 554 .....	589
Cowan v. Landell .....	13 O. R. 13 .....	696
Cowles v. Kidder .....	4 Foster N. H. 364 .....	230
Cox v. Great Western R. W. Co.....	9 Q. B. D. 106 .....	712
Coxhead v. Richards.....	2 C. B. 569 ....690, 695, 698, 702, 703	
Cozier, Re, Parker v. Glover .....	24 Gr. 537.....	578, 579, 581
Crawford v. Toogood.....	13 Ch. D. 153 .....	49, 50, 51
Cree v. Somervail .....	4 App. Cas. 648.....	265, 266
Creswick v. Thompson .....	6 P. R. 52 .....	442
Crisp v. Churchill .....	Cited in 1 B. & P. 340 .....	29
Croft v. Alison .....	4 B. & Al. 590.....	186
Crooks v. Allan .....	5 Q. B. D. 40 .....	526
Croskery, Re .....	16 O. R. 207.....	1, 3, 4, 10
Cross's Charity, Re .....	27 Beav. 592 .....	529, 531
Cross v. Barnes .....	36 L. T. N. S. 683.....	417, 419
Crowe v. Steeper.....	46 U. C. R. 87 .....	358
Crutchley v. Mann .....	5 Taunt. 529 .....	215
Cubitt v. Lady Caroline Maxse .....	L. R. 8 C. P. 704.....	136, 142
Curtin v. Great Southern R. W. Co ....	22 Ir. L. R. (1887) 219.....	709
Cushing v. Dupuy .....	5 App. Cas. 409 .....	170

## D.

Dalby v. Hirst.....	1 B. & B. 224 .....	530
Dalby v. Humphrey .....	37 U. C. R. 514.....	596
Dalby v. India & London Life Assurance Co .....	15 C. B. 365 .....	235
Daniels v. Municipal Council of Burford.	10 U. C. R. 478 .....	665, 668
Darley v. The Queen .....	12 Cl. & F. 520 .....	168
Dashwood v. Magniac .....	(1891) 3 Ch. 367 .....	529
Davidson v. Cooper .....	11 M. & W. 778; 13 M. & W. 343..	646
Davidson v. Ross .....	24 Gr. 22 .....	433, 436
Davies v. Snead .....	L. R. 5 Q. B. 608 .....	695
Davis v. Amer.....	5 Drew. 64 .....	23
Davis v. Canadian Pacific R. W. Co ....	12 A. R. 724 .....	359
Davis v. Hawke .....	4 Gr. 394 .....	222, 223
Davison v. Robinson .....	3 Jm. N. S. 791 .....	436
Dawson, Re .....	8 W. R. 554 .....	295, 296
Day v. Day .....	17 A. R. 157 .....	489, 496
Dean v. McDowell .....	8 Ch. D. 345 .....	318, 321
Denning v. Henderson .....	1 D. & S. 689 .....	651
Denton and Marshall, Re.....	1 H. & C. 660 .....	541
Des Plaines v. Poyer .....	14 N. E. Rep. 677 .....	328
Detlor v. Grand Trunk R. W. Co.....	15 U. C. R. 595 .....	284
DeVisme v. DeVisme.....	1 Mac. & G. 336 .....	652

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Dewe v. Waterbury .....	6 S. C. R. 143 .....	696
D'Eyncourt v. Gregory .....	L. R. 3 Eq. 382 .....	417
Dickinson v. Heron .....	Sug. V. & P., 14 ed., 630 .....	648
Dickson v. Carnegie .....	1 O. R. 110 .....	230
Dingman and Hall's Contract, Re .....	17 A. R. 398 .....	565, 648, 657
Doan v. Davis .....	23 Gr. 207 .....	6
Doe Irvine v. Webster .....	2 U. C. R. 224 .....	284
Doe Perry v. Henderson .....	3 U. C. R. 486 .....	82
Doe d. Reed v. Godwin .....	1 D. & R. 259 .....	35
Doe McLean v. Fish .....	5 U. C. R. 295 .....	19
Doe McKensie v. Fairman .....	7 U. C. R. 411 .....	284
Doe Parsley v. Day .....	2 Q. B. 147 .....	18
Doe Roylance v. Lightfoot .....	8 M. & W. 553 .....	13, 18
Dominion Bank v. Davidson .....	12 A. R. 90 .....	516
Dominion Bank v. Oliver .....	17 O. R. 404 .....	524
Don v. Lippmann .....	5 Cl. & F. 1 .....	340
Donovan v. Herbert .....	4 O. R. 635 .....	15, 86, 87
Douglas v. Hutchinson .....	12 A. R. 110 .....	377
Dovaston v. Payne .....	2 Sm. L. C., 6th ed., p. 140 .....	142
Dowell v. General Steam Navigation Co. ....	5 E. & B. 195 .....	715
Dowle v. Lucy .....	4 Ha. 311 .....	446
Dreyfus v. Peruvian Guano Co. ....	41 Ch. D. 151 ; 42 Ch. D. 66 ..	460, 549
Dudley Gaslight Co. v. Warmington. ....	44 L. T. N. S. 475 .....	508
Duero, Re .....	L. R. 2 Adm. 393 .....	520
Duke of Ancaster v. Mayer .....	1 W. & T. L. C., 6th ed. 757 ..	579
Duke of Bedford v. Marquis of Abercorn	1 M. & C. 312 .....	529, 531
Duncan, Ex parte .....	2 Cart. 297 .....	609
Dunkin v. Cockburn .....	13 O. R. 254 .....	387
Durnin v. McLean .....	10 P. R. 295 .....	106, 107
Dyer v. Poulteney .....	Barnardiston (Ch.) 160 .....	53
Dykes Estate, Re .....	L. R. 7 Eq. 337 .....	56
Dyson v. Hornby .....	4 D. & S. 481 .....	652

## E.

Eade v. Jacobs .....	3 Ex. D. 335 .....	555
Earl of Glengal v. Barnard .....	1 Keen 769 .....	341
Earl of Oxford v. Lady Rodney .....	14 Ves. 417 .....	580
Earl of Sandwich v. Great Northern R. W. Co. ....	10 Ch. D. 710 .....	230
Ecclesiastical Commissioners v. Commis- sioners of Sewers .....	14 Ch. D. 305 .....	403
Edgar v. Central Bank .....	15 A. R. 193 .....	158
Edmunds v. Waugh .....	L. R. 1 Eq. 418 .....	16, 20, 21
Edwards v. Cunliffe .....	1 Madd. 289 .....	446
Edwards v. Edwards .....	3 Madd. 197 .....	56
Elliott v. Turner .....	13 Sim. 477 .....	564
Elliott's Settled Estates .....	W. N. (1879) 135 .....	531
Else v. Barnard .....	28 Beav. 228 .....	446
Elsey v. Oddfellows M. R. Association. ....	142 Mass. 224 .....	272, 273
Elwes v. Maw .....	Sm. L. C., 9th Am. ed., p. 243 ..	417
Embrey v. Owen .....	6 Ex. 367 .....	230
Empress Engineering Co., Re .....	16 Ch. D. 125 ; 18 S. C. R. 698 ..	604
Engell v. Fitch .....	L. R. 4 Q. B. 659 .....	564
English and Irish Church and Univer- sity Assurance Society, Re .....	1 H. & M. 84 .....	233
Este v. Smith .....	18 Beav. 112 .....	339, 345
Evans v. Nichol & Ludlow .....	11 L. J. N. S. C. P. 6 .....	526
Evans v. Williams .....	2 Dr. & Sm. 324 .....	136



## F.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Fairbairn and Sandwich East, Re .....	32 U. C. R. 573 .....	591, 592, 593
Falck v. Axthelm .....	24 Q. B. D. 174 .....	442, 446
Farmer v. Russell .....	1 B. & P. 296 .....	29
Farquhar v. Corporation of Toronto .....	12 Gr. 186 .....	615
Farquhar v. Farley .....	7 Taunt. 592 .....	647
Farr v. McHugh .....	24 C. P. 13 .....	74
Farrell, Re .....	10 Ir. Ch. R. 304 .....	615
Farrow v. Smith .....	W. N. (1877) p. 21 .....	379
Featherstone v. Smith .....	20 Gr. 474 .....	460
Fee v. McIlhargey .....	9 P. R. 329 .....	279
Fenwick v. Bulman .....	L. R. 9 Eq. 165 .....	53
Ferguson v. Roblin .....	17 O. R. 167 .....	186
Ferguson v. Sampey .....	10 C. L. T. Occ. N. 110 .....	108, 293
Finch v. Gilray .....	16 A. R. 484 .....	80, 81, 86
Fisher v. Bridges .....	3 E. & B. 642 .....	29, 32
Fisher v. Dixon .....	12 Cl. & F. 312 .....	417
Fisher v. Prowse .....	2 B. & S. 770 .....	142
Fitzgerald v. Dressler .....	7 C. B. N. S. 374 .....	602
Fitzsimmons v. McIntyre .....	5 P. R. 119 .....	597
Fletcher v. Rodden .....	1 O. R. 155 .....	15
Fleury v. Pringle .....	26 Gr. 67 .....	4, 6
Floyer v. Bankes .....	L. R. 8 Eq. 115 .....	257, 259
Ford v. Allen .....	15 Gr. 565 .....	21
Forrer v. Nash .....	35 Beav. 167 .....	49, 52, 53
Forrest v. Harvey .....	4 Bell Sc. App. 213 .....	71
Forrest v. Laycock .....	18 Gr. 611 .....	6
Foster v. Foster, Re .....	4 B. & S. 203 .....	541
Foster v. Lawson .....	3 Bing. 452; 2 Wms. Saund. 383 .....	210
Fouldes v. Willoughby .....	8 M. & W. 540 .....	199
Fountain v. Boodle .....	3 Q. B. 5 .....	700
Fox, Re, Dawes v. Druitt .....	28 Sol. J. 738 .....	379
Frazee, Re .....	63 Mich. 396 .....	328
Free v. Burgoyne .....	5 B. & C. 400 .....	598
Free v. McHugh .....	24 C. P. 13 .....	79
Freeman v. Arkell .....	1 C. P. 137 .....	555
Freeman v. Pope .....	L. R. 5 Ch. 538 .....	438
Frisby, Re, Allison v. Frisby .....	43 Ch. D. 106 .....	573, 574
Fullam v. Adams .....	37 Verm. 391 .....	602
Fuller v. Knapp .....	24 Fed. Rep. 104 .....	234
Furlong v. Reid .....	12 P. R. 201 .....	429

## G.

Games v. Bonnor .....	33 W. R. 64 .....	375, 376, 377
Games v. Stiles .....	14 Peters 322 .....	190
Gandy v. Gandy .....	30 Ch. D. 57 .....	249, 252, 602
Ganong v. Bayley .....	1 P. & B. 324, 2 Cart. 509 .....	167, 170
Gardener v. Lucas .....	3 App. Cas. 582 .....	136
Garnett v. Bradley .....	3 App. Cas. 966 .....	633
Garth v. Townsend .....	L. R. 7 Eq. 220 .....	56, 59
Gee v. Metropolitan R. W. Co. ....	L. R. 8 Q. B. 161 .....	306
Gerey's Case .....	R. M. 873 .....	597
Gibbons v. McDonald .....	18 A. R. 159 .....	431
Gibson v. Barton .....	L. R. 10 Q. B. 329 .....	328
Gibson v. McDonald .....	7 O. R. 415 .....	168
Giles v. Grover .....	1 Cl. & F. 77 .....	186
Ginger v. Ginger .....	L. R. 1 P. & D. 37 .....	449

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Glasspoole v. Young .....	9 B. & C. 696 .....	626
Golds and Norton's Contract, Re .....	52 L. T. N. S. 321 .....	647, 651
Gooderham v. Denholm .....	18 U. C. R. 203 .....	417
Goodright v. Searle .....	2 Wils. 29 .....	361, 365
Goodtitle v. White .....	15 East 174 .....	361, 364, 366
Goodtitle dem Gurnall v. Wood .....	Willes 211 .....	361, 365
Goom v. Afalo .....	6 B. & C. 117 .....	347
Goring v. London Mutual Fire Ins. Co. ....	10 O. R. 236 .....	313
Gould v. Coombs .....	1 C. B. 543 .....	604
Graham v. Campbell .....	7 Ch. D. 490 .....	460, 462
Graham v. Chapman .....	21 L. J. C. P. 173 .....	437
Graham v. Devlin .....	9 C. L. T. Occ. N. 137 .....	248
Grand Trunk Railway v. Jennings .....	13 App. Cas. 800 .....	302
Grand Hotel Co. v. Cross .....	44 U. C. R. 153 .....	530
Grant v. People's Loan Co .....	17 A. R. 85 .....	16, 21
Grant v. Wilson .....	17 U. C. R. 144 .....	417
Grave v. Bishop .....	25 L. J. N. S. Ex. 58 .....	115
Gray v. Fowler .....	L. R. 8 Ex. 249 .....	92
Gray v. McMillan .....	5 C. P. 400 .....	340, 341
Gray v. Reesor .....	16 Gr. 614 .....	50
Gray v. Richford .....	1 A. R. 112, 2 S. C. R. 431 .....	284, 288
Graydon and Hammill, Re .....	20 O. R. 206 .....	98, 101
Green v. Britten .....	1 D. J. & S. 649 .....	379
Green v. Sevin .....	13 Ch. D. 601 .....	50, 51
Greenizen v. Burns .....	13 A. R. 481 .....	596, 597
Greenwood v. Philadelphia W. & B. R. Co. ....	17 Atl. R. 188, 124 Penn. St. R. 572 .....	709
Greenwood v. Turner .....	64 L. T. N. S. 261 .....	710
Greet v. Citizens' Ins. Co .....	27 Gr. 121 .....	102, 103
Grieve v. Molson's Bank .....	8 O. R. 162 .....	313
Grieve v. Molson's Bank .....	8 O. R. 162 .....	709
Griffith, Ex parte .....	23 Ch. D. 72 .....	432, 436, 438
Griffith v. Blake .....	27 Ch. D. 474 .....	460
Griffith v. Brown .....	5 A. R. 303 .....	86, 87
Guardians of Poor of Southampton v. Bell. ....	21 Q. B. D. 297 .....	298
Guerin, Re .....	60 L. T. 541 .....	180
Guerin v. Bank of France .....	5 Times L. R. 160 .....	180

## H.

Hague, Re .....	14 O. R. 660 .....	1, 4, 10
Haigh v. Kaye .....	L. R. 7 Ch. 469 .....	496
Hall, Ex parte .....	19 Ch. D. 580 .....	432, 436, 438
Hall, Ex parte .....	23 Ch. D. 644 .....	462
Hall, Re .....	8 A. R. 31 .....	135, 180, 468
Hall v. Prittie .....	17 A. R. 306 .....	614, 615, 618
Hamilton v. Cousineau .....	Q. B. D. Dec. 31, 1890 .....	398
Hamilton and Flamborough Road Co. v. ....		
Townsend .....	13 A. R. 534 .....	70
Hamlyn v. Betteley .....	6 Q. B. D. 63 .....	627
Hammersmith and City R. W. Co. v. ....		
Brand .....	L. R. 4 H. L. 171 .....	629
Hanslip v. Padwick .....	5 Ex. 615 .....	92
Harling v. Mayville .....	21 C. P. 11 .....	74
Harris v. Hamilton, Re .....	44 U. C. R. 614 .....	167
Harris v. Mallock .....	21 U. C. R. 82 .....	417
Harris v. Mudie .....	7 A. R. 414 .....	87
Harris v. Thompson .....	13 C. B. 333 .....	704
Harrison v. Bevington .....	8 C. & P. 708 .....	206, 210
Harrison v. Harrison .....	L. R. 8 Ch. 346 .....	552

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Hartford v. Power.....	Ir. R. 2 Eq. 212 (1868) ..	378, 379
Hartley v. Halse.....	22 Q. B. D. 200.....	429
Haswell v. Haswell.....	1 Sw. & Tr. 504.....	450
Hatten v. Russell.....	38 Ch. D. 334.....	53
Hawley v. Bradford.....	9 Paige 199.....	4
Hawthorne, Re Graham v. Massey.....	23 Ch. D. 743.....	548, 549
Hayes v. Board of School Trustees, Re Toronto.....	3 C. P. 478.....	79
Hayman v. Governors of Rugby School..	L. R. 18 Eq. 28.....	335
Haythorn v. Lawson.....	3 C. & P. 196.....	207, 210
Heath v. Pugh.....	6 Q. B. D. 345.....	16
Heck v. Knapp.....	20 U. C. R. 360.....	19
Hellem v. Severs.....	24 Gr. 320.....	456, 457
Henderson v. Bank of Australasia.....	40 Ch. D. 392.....	234
Henderson v. Kerr.....	22 Gr. 91.....	369, 370, 371
Henderson v. Killey.....	14 O. R. 137, 17 A. R. 456, 18 S. C. R. 698.....	578, 602, 604
Heney v. Low.....	9 Gr. 265.....	4
Hennesy v. Wright.....	21 Q. B. D. 509.....	560, 561
Herbert v. Salisbury etc. R. W. Co.....	L. R. 2 Eq. 225.....	652
Hessin v. Coppin.....	21 Gr. 253.....	460, 462
Hewlett v. Crutchley.....	5 Taunt. 277.....	397
Hickey v. Corporation of Renfrew.....	20 C. P. 429.....	332
Hicks v. Newport, etc., R. W. Co.....	4 B & S. 403, note ..	209, 302, 306, 307
Hill, Ex parte.....	23 Ch. D. 695.....	432, 435, 436
Hillary v. Waller.....	12 Ves. 252.....	111
Hillock v. Sutton.....	2 O. R. 548.....	82, 87
Hiort v. Bott.....	L. R. 9 Ex. 86.....	199
Hislop v. Township of McGillivray....	12 O. R. 749, 15 A. R. 687.....	136
Hoare v. Dresser.....	28 L. J. N. S. Ch. 611.....	526
Hobbs & Co. (Limited) v. Hudson & Co..	62 L. T. R. 764.....	392
Hodge v. The Queen.....	9 App. Cas. 117.....	167, 608
Hodgins v. Ontario Loan & Debenture Co.	7 A. R. 202.....	241
Hodgson, Re.....	9 Ch. D. 673.....	586
Holland v. Hodgson.....	L. R. 7 C. P. 328.....	417, 418
Holmes v. Newcastle-upon-Tyne Free- hold Abattoir Co.....	1 Ch. D. 688.....	354
Hoole v. Attorney-General.....	22 Ala. 190.....	139, 145
Hooper v. Williams.....	2 Ex. 13.....	215
Hopkins Trust, Re.....	9 Ch. D. 131.....	661
Howey v. Howey.....	27 Gr. 57.....	449
Howeren v. Bradburn.....	22 Gr. 96.....	13
Howland v. Norris.....	1 Cox 59.....	648, 651
Howley v. Young, Re.....	7 C. L. T. Occ. N. 346.....	279
Hubert v. Township of Yarmouth.....	18 O. R. 458.....	143
Hughes v. Lumley.....	4 E. & B. 358.....	108
Hull and County Bank, Re, Burgess' Case	15 Ch. D. 509.....	265
Hulme v. Tennant.....	1 W. & T. L. C., 6th ed., 546.....	377
Humphreys v. Hunter.....	20 C. P. 456.....	35, 40
Hunt v. Hespeler.....	6 C. P. 269.....	231
Hunter v. Walters.....	L. R. 7 Ch. 75.....	222
Hutchinson v. Morritt.....	3 Y. & C. 554.....	111

## I.

I——— v. K———.....	W. N. March, 1884, p. 63.....	248
Imperial Mercantile Credit Association, Re, Chapman and Barker's Case.....	L. R. 3 Eq. 361.....	265
Ingham v. Walker.....	31 Sol. J. 271.....	626
Inkop v. Morchurch.....	2 F. & F. 501.....	392
Ivey v. Knox.....	8 O. R. 635.....	432, 436, 438



## J.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Jack v. Ontario Simcoe and Huron R. W. etc. Co.	14 U. C. R. 328	358
Jackson v. Petrie	10 Ves. 163	548
Jackson, Re	58 L. J. Ch. 387	295
Jacobs, Marcus & Co. v. Credit Lyonnais	12 Q. B. D. 589	520
Jacques v. Millar	6 Ch. D. 153	564
James v. McGibney	24 U. C. R. 155	18
Jaques v. Miller	6 Ch. D. 153	647
Jeffs v. Woods	2 P. Wms. 128	586
Jenkins v. Central Ontario Co.	4 O. R. 593	404
Jenoure v. Delmege	(1891) App. Cas. 73	704
Jewell v. Parr	13 C. B. 909	306
John v. Jenkins	1 C. & M. 227	392
Johnson, Re	9 P. R. 425	544
Johnson v. Fessenmeyer	25 Beav. 88; 3 De G. & J. 13	436
Johnston v. Cline	16 O. R. 129	489, 495, 496
Johnston v. Hope	17 A. R. 10	431
Johnston v. Northern R. W. Co.	34 U. C. R. 432	709
Jones, Sir Thomas, Settled Estates, Re	1 Giff. 287	444
Jones v. Barclay	2 Doug. 684	373
Jones v. Grand Trunk R. W. Co.	16 A. R. 37, 18 S. C. R. 696	709
Jones v. Hough	5 Ex. 115	526
Jordan v. Marr	4 U. C. R. 53	596, 597
Juggomohun Ghose v. Manickchund and Kaisreechund	7 Moo. Ind. App. Cas. 263	530
Julius v. Bishop of Oxford	5 App. Cas. 214	177

## K.

Keefer v. Merrill	6 A. R. 121	416
Kelley v. Macarow, Re	14 C. P. 457	167
Kelly v. Earl	29 C. P. 477	29
Kelly v. Jackson	6 Pet. 622	506
Kelly v. Ottawa Street R. W. Co	3 A. R. 616	629
Kerkin v. Kerkin	3 E. & B. 399	598
Kermott, Re	1 C. L. Chamb. R. 253	180
Kensington v. Chantler	2 M. & S. 36	548
Kensit v. Great Eastern R. W. Co	27 Ch. D. 122	230
Kernot v. Bailey	2 U. C. L. J. O. S. 178	105
Kerr v. Stripp	24 Gr. 198	376
Kershaw v. Kershaw	L. R. 9 Eq. 56, 648, 651, 652, 654, 657	
Kiely v. Kiely	3 A. R. 438	353
Kimbray v. Draper	L. R. 3 Q. B. 160	108
King v. Waring	5 Esp. 13	699
Kingston and Pembroke R. W. Co. and Murphy, Re	11 P. R. 304	403
Knapman, Re	18 Ch. D. 304	588
Krebs v. Oliver	12 Gray (Mass.) 239	695, 697

## L.

Lamb v. Sutherland	37 U. C. R. 143	615
Lanfeur v. Sumner	17 Mass. 109	518
Langmaid v. Mickle	16 O. R. 111	381
Langtry v. Dumoulin	7 O. R. 517	341
Larios v. Gurety	L. R. 5 P. C. 346	564

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Last v. London Assurance Corporation..	10 App. Cas. 438.....	234
Laughton v. Bishop of Sodor and Man..	L. R. 4 P. C. 495 .....	704
Law v. Garrett .....	8 Ch. D. 26.....	23, 24
Lawrence v. Matthews .....	5 Dowl. 149.....	626
Lawrie v. Lees .....	7 App. Cas. 19.....	596
Leadbitter, Re.....	10 Ch. D. 388 .....	295
Leary v. Rose.....	10 Gr. 346 .....	284
Leduc & Co. v. Ward .....	20 Q. B. D. 475.....	526
Lee, Re.....	5 O. R. 593 .....	468, 474
Lee v. Egremont.....	5 DeG. J. & Sm. 459.....	586
Lee v. Soames.....	59 L. T. 366 .....	52
Leeming v. Sherratt .....	2 Ha. 14 .....	663
Legh v. Hewitt.....	4 East. 154.....	530
Leibes v. Ward, Re.....	45 U. C. R. 375.....	279
Leigh v. Dickeson .....	15 Q. B. D. 60.....	257, 258, 259
Les Ecclesiastiques de St. Sulpice de Montreal v. City of Montreal.....	16 S. C. R. 399.....	98, 101
Lett v. St. Lawrence and Ottawa R. W. Co .....	1 O. R. 545 .....	712, 714, 715
Levi, Ex parte .....	7 Viner's Abrig. 61.....	115
Lewin v. Wilson.....	11 App. Cas. 639 .....	572, 573, 575
Lewis, Ex parte .....	21 Q. B. D. 191 .....	327
Lewis v. South Wales R. W. Co.....	10 Ha. 113.....	651
Lilley and Allin, Re.....	21 O. R. 424 .....	539
Lister v. Perryman.....	L. R. 4 H. L. 421 .....	394
Livingstone v. Temperance Colonization Society .....	17 A. R. 379 .....	353
Lloyd, Re—Lloyd v. David Lloyd & Co..	6 Ch. D. 345 .....	371
Lloyd v. Guibert.....	L. R. 1, Q. B. 115 .....	340
Lloyd v. Johnston .....	1 B. & P. 340 .....	29
Local Government Board, Re.....	L. R. 16 Ir. 150, L. R. 18 Ir. 509..	543
Loffus v. Maw.....	3 Gift. 592; 8 Jur. N. S. 607 .....	340
London Assurance v. Mansell.....	11 Ch. D. 363 .....	313, 317
London and Canadian Loan, etc., Co. v. Pulford .....	8 P. R. 150 .....	417
London and Canadian L. & A. Co. v. Smythe.....	7 C. L. T. Occ. No. 17 .....	16
London, Hamburg and Continental Ex- change Bank, Re, Zulueta's Claim....	L. R. 5 Ch. 444 .....	265
London and Lancashire Ins. Co. v. British American Insurance Co.....	52 L. T. N. S. 385 .....	596
Long v. Hancock .....	7 O. R. 154, 12 A. R. 137, 12 S. C. R. 532 .....	432, 436, 438
Long v. Taxing District of Shelby County	7 Lea. (Tenn.) 134 .....	327
Long Point Co. v. Anderson, Re. ....	18 A. R. 401 .....	627
Lord Cranstoun v. Johnston .....	3 Ves. 170 .....	548
Lord Palmerston v. Turner .....	33 Beav. 524 .....	567, 647
Lord Portarlington v. Soulby .....	3 M. & K. 104 .....	548, 550
Lowe v. Goodman .....	42 J. P. 825.. ..	558, 561
Luling v. Atlantic Mutual Insurance Co.	45 Barb. 515 .....	234
Lush v. Webb.....	1 Sid. 251.....	597
Lyddall v. Westan .....	2 Atk. 19 .....	111
Lyden v. McGee.....	16 O. R. 105 .....	186
Lynn, Re, Lynn v. Toronto General Trust Co .....	20 O. R. 475 .....	634

## M.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Mahar v. Fraser .....	17 C. P. 408.....	19
Male v. Bouchier.....	1 Ch. Ch. 359, 2 Ch. Ch. 254, 535, 536, 537	
Manby v. Gresham Life Ins. Co.....	7 Jur. N. S. 383 .....	233
Mann v. English.....	38 U. C. R. 240 .....	19
Manning v. Manning.....	Ir. 7 Eq. 520.....	451
Marks v. Beyfus.....	25 Q. B. D. 494.....	556, 561
Marshall v. McRae.....	17 A. R. 139, 11 C. L. T. 257 .....	335
Marshfield, Re.....	34 Ch. D. 721.....	20
Marter and Gravenhurst, Re.....	18 O. R. 243 .....	430
Martin v. Martin.....	2 Russ. & M. 507.....	341
Martin v. Mitchell.....	1 Ch. Chamb. R. 384.....	293
Martindale v. Clarkson.....	6 A. R. 1.....1, 3, 4, 10,	136
Massie v. Watts .....	6 Cranch. (U. S.), 160.....	548, 550
Massy v. Hayes .....	L. R. 4 H. L. 288 (1869).....	378
Massy v. Rowen .....	L. R. 4 H. L. 288.....	377, 379
Masters v. Baretto .....	8 C. B. 433 .....	215
Mather v. Fraser .....	2 K. & J. 536 .....	417
Mathers v. Helliwell .....	10 Gr. 172.....	95, 96, 97
Mayor of London v. Cox .....	L. R. 2 H. L. 280 .....	540
Mayor's Court of London, Re, Broad v. Perkins .....	21 Q. B. D. 533.....	540
Meek v. Scobell.....	4 O. R. 553.....	596
Meier v. Portland etc. R. W. Co.....	19 Pacific Reporter, 610 .....	137, 148
Mellersh v. Brown .....	45 Ch. D. 225.....	16
Mercer, Ex parte .....	17 Q. B. D. 290.....	438
Merchants Bank of Canada v. Hancock..	6 O. R. 285 .....	352, 353
Merchants Bank v. Monteith .....	10 P. R. 588.....	634
Merchants Bank v. Sutor. ....	24 Gr. 356.....	515
Merritt v. Brinkerhoff.....	17 Johns. 306.....	230
Metropolitan R. W. Co. v. Jackson.....	3 App. Cas. 193.....	306
Meyers v. Baker .....	26 U. C. R. 16 .....	108, 293
Michell v. Williams .....	11 M. & W. 205.....	393
Michie and Toronto, Re .....	11 C. P. 379 .....	328
Middleton v. Lawte.....	R. Mo. 879 .....	597
Milliken v. Weatherford .....	54 Texas 388.....	327
Miner, Ex parte.....	15 Jur. 1037.....	105
Milner v. Gilmour .....	12 Moo. P. C. 156.....	230
Mingeaud v. Packer .....	21 O. R. 267.....	634, 638
Missouri Steamship Co., Re, Munro's Claim .....	61 L. T., N. S., 316.....	520
Mitchell v. City of London Assurance Co.	15 A. R. 262 .....	602
Mitchell v. Scribner, Re.....	20 O. R. 17.....	596
Mitre Assurance Co., Re, Eyre's Case....	31 Beav. 177.....	265
Moffatt v. Thompson.....	3 Gr. 111.....	3
Molson's Bank v. Janes.....	9 L. C. Jur. 81 .....	524
Molson's Bank v. Girdlestone.....	44 U. C. R. 54.....	524
Molson's Bank v. Halter.....	18 S. C. R. 88.....	431, 436
Moncton and Gilzean, Re.....	27 Ch. D. 556.....	568, 647, 651
Moon v. Durden .....	2 Ex. 22 .....	136
Moore v. Jackson .....	20 O. R. 652, 16 A. R. 431 .....	376, 377, 412
Moore v. Luce.....	18 C. P. 446 .....	115
Morley v. Matthews .....	14 Gr. 551 .....	257
Morrison v. General Steam Navigation Co.	8 Ex. 733.....	715
Morrow v. Connor.....	11 P. R. 423.....	291, 293
Morse v. Martin .....	34 Beav. 500.....	56
Morton and Corporation of St. Thomas, Re	6 A. R. 323.....	131, 136

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Mory v. Wood.....	3 Bro. C. C. 473.....	663
Moseley Green Coal and Coke Co. (Limited), Re Barrett's Case.....	4 DeG. J. & S. 421.....	266
Mulholland v. Merriam .....	19 Gr. 288.....	579, 602
Muller's Case.....	Cited in Clarke's Law of Extradition, 3rd ed., 218 .....	472
Munro v. Watson.....	57 L. T. 366.....	247
Munster and Leinster Bank v. France... ..	L. R. 24, Ir. 82 .....	96
Murphy v. Kingston and Pembroke R. W. Co .....	11 O. R. 382, 582, 17 S. C. R. 582.....	403, 405, 408
Murrell v Goodyear .....	1 D. F. & J. 432.....	52
Muttlebury v. Stevens .....	13 O. R. 29.....	16

## Mc.

McAlpine v. Young .....	2 Ch. Ch. 171 .....	442
McArthur v. Northern Pacific Junction R. W. Co.....	17 A. R. 86.....	629, 632
McArthur v. Vanderburgh .....	Cited in 41 U. C. R. 260 .....	593
McCausland v. McCallum .....	3 O. R. 305 .....	417
McConaghy v. Denmark .....	4 S. C. R. 632 .....	87
McCracken v. Creswick .....	8 P. R. 501 .....	596
McCrae v. Molson's Bank.....	25 Gr. 521 .....	524
McCulloch and Judge of Leeds and Gren- ville .....	35 U. C. R. 449.....	539
McCullough v. Burnham .....	Cited in 41 U. C. R. 260 .....	593
Macdonald v. Macdonald.....	11 O. R. 187 .....	13
McDonald v. Elder.....	1 Gr. 513 .....	49
MacDonald v. McCall .....	12 A. R. 593 .....	117
Macdonald v. Murray .....	2 O. R. 573, 11 A. R. 101.....	50, 102, 103
McDonald v. Weeks.....	8 Gr. 297.....	417
Macdougall v. Paterson.....	11 C. B. 775.....	177
McFadzen v. Mayor, etc., of Liverpool..	L. R. 3 Ex. 279 .....	555
McFaul v. Montreal Ins. Co.....	2 U. C. R. 59.....	313
McGill v. Walton .....	15 O. R. 389 .....	392
McGillicuddy v. Griffin.....	20 Gr. 81.....	291
McGregor v. Norton, Re.....	13 P. R. 233.....	280, 411
McGugan v. McGugan, Re.....	21 O. R. 289.....	599
McIntosh v. Ontario Bank.....	20 Gr. 24 .....	261
McIntosh v. Rogers.....	12 P. R. 394 .....	377
McIntyre v. Hockin .....	16 A. R. 498.....	335
McIntyre v. Stata and Cryder.....	4 C. P. 248 .....	187
McKay v. Palmer, Re.....	12 P. R. 219 .....	279
McKechnie v. McKeyes.....	9 U. C. R. 563, 10 U. C. R. 37.....	231
McKnight v. Toronto.....	3 O. R. 284 .....	327
McLaren v. Archibald.....	C. P. D. Dec. 20 (1890).....	398
McLean v. McLeod, Re.....	5 P. R. 467 .....	279
McMaster v. Garland.....	8 A. R. 1.....	516
McMichael v. Wilkie.....	18 A. R. 464 .....	575
McMurray v. Spicer.....	L. R. 5 Eq. 527 .....	49
McPhee v. McPhee .....	19 O. R. 603.....	602, 603
McPherson v. McPhee, Re.....		280

## N.

Natal Investment Co, Re.....	L. R. 3 Ch. 355 .....	222
Neal's Trusts, Re .....	4 Jur. N. S. 6 .....	453
Nelson v. Cook .....	12 U. C. R. 22 .....	284



NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Nelson v. Pierce.....	6 N. H. 194.....	190
Newbold v. Smith.....	29 Ch. D. 882, 33 Ch. D. 127, 14 App. Cas. 423.....	573, 574
Newby v. Harrison.....	3 D. F. & J. 287.....	460, 461
New Brunswick R. W. Co. v. Vanwart..	17 S. C. R. 35.....	710, 715
Newcomen v. Coulson.....	7 Ch. D. 764.....	460
Newman v. London and South-Western R. W. Co.....	7 Times L. R. 138.....	709
Newton v. Chantler.....	7 East 138.....	437
Newton and Smith, Re.....		539
New York Life Ins. Co. v. Statham.....	93 U. S. 24.....	272
New York Life Assurance Co. v. Styles..	14 App. Cas. 381.....	234, 239
New York, etc., R. W. Co. v. Nikals.....	119 U. S. 296.....	353
Nichols v. Watson.....	23 Gr. 606.....	579, 580, 581
Nicolls v. Madill.....	6 U. C. R. 415.....	284
Norris v. Chambers.....	29 Beav. 246.....	549, 550
Norris v. Meadows.....	28 Gr. 334, 7 A. R. 237.....	96, 579
North Pennsylvania R. R. Co. v. Heilman.....	49 Penn. St. R. 60.....	710
North Shore R. W. Co. v. McWillie.....	17 S. C. R. 511.....	628, 629
Norton v. Smith.....	20 U. C. R. 213.....	4
Novello v. James.....	5 D. M. & G. 876.....	460

## O.

Oakley v. Pasheller.....	4 Cl. & F. 207.....	96
Oates v. Cameron.....	7 U. C. R. 228.....	417
Oates v. Forresters.....	4 O. R. 535.....	272
O'Brien v. Welsh.....	28 U. C. R. 394.....	108, 293
O'Connell's Case.....	Arm. & P. 178.....	561
Ogle v. Atkinson.....	5 Taunt. 759.....	526
O'Heron, Re.....	11 P. R. 422.....	271
O'Keefe v. Taylor.....	2 Gr. 305.....	102
Olivier v. Towns.....	7 Martin (La.) 50.....	518
Ontario and Quebec R. W. Co. v. Philbrick.....	5 O. R. 674, 12 S. C. R. 289.....	404
Opera Co., Re.....	(1891) 2 Ch. 154.....	442
Opperman v. Smith.....	4 D. & R. 36.....	393, 396
Oriental Bank Corporation, Re.....	56 L. T. N. S. 868.....	442, 446
Oriental Financial Corporation v. Overend Gurney & Co.....	L. R. 7 H. L. 348.....	96
Orme v. Broughton.....	10 Bing. 533.....	647, 652
Orr Ewing v. Colquhoun.....	2 App. Cas. 855.....	230
Orr Ewing, Re, Orr Ewing v. Orr Ewing.	22 Ch. D. 456.....	249
Orrell v. Coppock.....	2 Jur. N. S. 1244.....	602
Osborne v. Foreman.....	8 D. M. & G. 122.....	442
Osborne v. Henderson.....	18 S. C. R. 698.....	605
Ostrom and Township of Sidney.....	15 A. R. 372.....	480

## P.

Packham v. Gregory.....	4 Ha. 399.....	663
Paine v. Jones.....	76 N. Y. 274.....	96
Paisley v. Wills.....	19 O. R. 303.....	49
Palmer v. Johnston.....	13 Q. B. D. 351.....	82
Palmer v. Palmer.....	2 Sw. & Tr. 62.....	449
Panton v. Williams.....	2 Q. B. 169.....	393
Pardee v. Glass.....	11 O. R. 275.....	203
Parisot, Re.....	5 Times L. R. 344.....	180

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Parker, Re .....	26 C. L. J. 619 .....	180
Parker, Re .....	19 O. R. 612.....	177, 180, 468, 469
Parker v. Maxwell.....	14 O. R. 239.....	380, 381, 387
Park Gate Iron Co. v. Coates.....	L. R. 5 C. P. 637.....	541
Parry v. Duncan.....	7 Bing. 243 .....	392
Parsons and Toms, Re.....	36 U. C. R. 91.....	540, 544
Partridge v. Strange .....	Plowd. 88.....	284
Pascoe v. Swan.....	27 Beav. 508.....	257
Paterson v. Powell.....	9 Bing. 320 .....	235
Patrick v. Milner.....	2 C. P. D. 342.....	49
Patterson v. Johnson.....	20 Gr. 583 .....	417
Pearce v. Brooks.....	L. R. 1. Ex. 213 .....	29, 30
Pearce v. Morris.....	L. R. 8 Eq. 218, L. R. 5 Ch. 228.	574
Pear v. Grand Trunk R. W. Co.....	10 A. R. 191.....	709, 711
Peers v. Sneyd.....	17 Beav. 151.....	531
Pellecat v. Angell.....	2 C. M. & R. 311.....	29
Penn. v. Lord Baltimore .....	1 Ves. Sr. 444 .....	549
People v. Armstrong.....	16 Am. St. R. 581.....	327
People v. Rochester .....	51 N. Y. Sup. Ct. (44 Hun) 166 ..	328
People v. Underwood .....	16 Wend. 546.....	117
Peterkin v. McFarlane .....	9 A. R. 429 .....	584
Pettit & Co. v. First National Bank of Memphis .....	4 Bush. (Ky.) 334.....	526
Pfeiffer v. Midland R. W. Co.....	18 Q. B. D. 243.....	427
Phelps v. Prothero.....	7 D. M. & G. 293 .....	652
Phillips, Re.....	41 Ch. D. 417.....	56
Phillips v. Cayley.....	43 Ch. D. 222 .....	57
Phillips v. Grand River Farmers Mutual Insurance Co.....	46 U. C. R. 334 .....	313, 417
Philps v. Hornstedt .....	1 Ex. D. 62 .....	437
Phipps, Re .....	8 A. R. 77. ....	180, 466, 467, 468
Pigott's Case .....	11 Rep. 266.....	646
Pilcher v. New York Life Ins. Co.....	33 La. 322 .....	272
Pilcher v. Rawlins.....	L. R. 7 Ch. 259.....	82
Pim v. Municipal Council of Ontario.....	9 C. P. 304.....	332
Plews v. Baker .....	L. R. 16 Eq. 564.....	23, 25
Pollen Trustee, Ex parte .....	34 W. R. 442 .....	187
Polson v. Degeer .....	18 O. R. 275.....	203
Pope v. Griffith.....	2 Cart. 291.....	609
Pope v. Reilly .....	29 U. C. R. 495.....	108
Potts v. Meyers.....	14 U. C. R. 499.....	4
Powell v. Martyr .....	8 Ves. 146 .....	648, 651, 654
Powell v. Peck .....	12 O. R. 492, 15 A. R. 138.....	16
Pratt v. Corporation of Stratford.....	16 A. R. 5 .....	134
Press and Inskip, Re.....	35 Beav. 34 .....	295
Prestney v. Mayor, etc., of Colchester ..	21 Ch. D. 111 .....	530
Pritchard v. Lang .....	5 Times L. R. 639 .....	308

## Q.

Queen, The, v. The Tithe Commissioners.	14 Q. B. 459 .....	177
Queensland, etc., Co., Re.....	(1891) 1 Ch. 536.....	520

## R.

Radley v. London and North-Western R. W. Co.....	L. R. 9 Ex. 71.....	714
Rapelje v. Finch.....	14 U. C. R. 468 .....	187

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Railway Times Publishing Co., Re, Ex parte Sandys.....	42 Ch. D. 98.....	351
Ramsden v. Dyson.....	L. R. 1 H. L. 129.....	82
Rauscher's Case.....	119 U. S. 407.....	180
Ravenger v. McIntosh.....	2 B. & C. 697.....	397
Read v. Storey.....	30 L. J. M. C. 110; 6 H. & N. 423.....	633
Read v. Great Eastern R. W. Co.....	L. R. 3 Q. B. 555.....	301
Reeves v. Barlow.....	12 Q. B. D. 436.....	200
Regent's Canal Co. v. Ware.....	23 Beav. 575.....	651
Regina ex rel, Telfer v. Allan.....	1 P. R. 214.....	168
Regina v. Becker.....	20 O. R. 681.....	606
Regina ex rel Grayson v. Bell.....	1 C. L. J. N. S. 130.....	168
Regina v. Bennett.....	1 O. R. 445.....	167, 170
Regina v. Boardman.....	30 U. C. R. 553.....	607, 608, 610
Regina v. Brown.....	16 O. R. 41.....	671
Regina v. Carden.....	5 Q. B. D. 1.....	467
Regina ex rel Grant v. Coleman.....	8 P. R. 497.....	167, 168
Regina v. Donaldson.....	24 C. P. 148.....	148
Regina ex. rel Wilson v. Duncan.....	11 P. R. 379.....	167
Regina v. Flynn.....	20 O. R. 638.....	671
Regina v. Gamble.....	9 U. C. R. 554.....	516
Regina v. Giles.....	6 C. P. 84.....	466
Regina v. Government Local Board.....	10 Q. B. D. 309.....	480, 482
Regina v. Griffiths.....	16 Cox. C. C. 46.....	467
Regina v. Hagerman.....	15 O. R. 598.....	465, 474
Regina v. Hardy.....	24 Howell's St. Tr. 808.....	555, 561
Regina v. Harper.....	7 Q. B. D. 78.....	215, 218
Regina v. Harrison.....	24 W. R. 392.....	671
Regina v. Hart.....	20 O. R. 611.....	606
Regina v. Hartley.....	20 O. R. 481.....	670, 671, 674
Regina v. Hollister.....	8 O. R. 750.....	621
Regina ex rel Felitz v. Howland.....	11 P. R. 264.....	167
Regina v. Hughes.....	2 Moo. C. C. R. 190.....	190
Regina v. Inhabitants of St. Mary, Warwick.....	1 E. & B. 827.....	414
Regina v. Justices of Surrey.....	1 Jur. N. S. 1138.....	671
Regina v. Kerstevan.....	3 Q. B. 810.....	430
Regina v. Klemp.....	10 O. R. 143.....	671
Regina v. Langford.....	15 O. R. 52.....	671
Regina v. Lavaudier.....	15 Cox. 329.....	180
Regina v. Lawrence.....	43 U. C. R. 164.....	606
Regina v. London County Council.....	8 Times L. R. 175.....	670, 673
Regina v. Meyer.....	11 P. R. 477.....	607
Regina v. Meyer.....	1 Q. B. D. 173.....	671, 673
Regina v. Morton.....	19 C. P. 9.....	180
Regina ex rel Dougherty v. McClay.....	13 P. R. 56.....	167
Regina v. McDonald.....	31 U. C. R. 337.....	466
Regina v. McFee.....	13 O. R. 8.....	215, 216
Regina v. McGregor.....	19 C. P. 69.....	591, 593
Regina v. Matthews.....	7 P. R. 199.....	468
Regina v. Ottawa and Gloucester Road Co.....	42 U. C. R. 478.....	508, 513
Regina v. Oxford Turnpike, etc., Roads, Trustees of.....	12 A. & E. 427.....	508, 513
Regina v. Richardson.....	3 F. & F. 693.....	555, 556, 561
Regina ex rel White v. Roach.....	18 U. C. R. 226.....	167
Regina v. Reno.....	4 U. C. L. J. N. S. 315; 4 P. R. 281.....	180, 467, 468, 471
Regina v. Roddy.....	41 U. C. R. 291.....	606
Regina v. Smith.....	6 Cox C. C. 31.....	116

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Regina v. Sproule .....	14 O. R. 375 .....	671
Regina ex rel Johns v. Stewart .....	16 O. R. 5 583 .....	167
Regina v. Tubbee .....	1 P. R. 98 .....	180
Regina v. Twiss .....	L. R. 4 Q. B. 407 .....	543
Regina v. Ward .....	L. R. 8 Q. B. 210 .....	168
Regina v. Wason .....	17 A. R. 221 .....	167, 170, 606, 607, 610
Regina v. Williams .....	2 Den. C. C. 61 .....	215, 217, 218
Reid v. Coleman .....	19 O. R. 93 .....	686
Reiner v. Marquis of Salisbury .....	2 Ch. D. 378 .....	549
Reist v. Grand Trunk R. W. Co. ....	15 U. C. R. 355 .....	628, 629
Revision of the Voters' Lists of Goderich, Re .....	6 P. R. 213 .....	540
Rex v. Boston .....	12 A. & E. 470 .....	633
Rex v. Randall .....	R. & R. 195 .....	216
Rex v. Richards .....	R. & R. 193 .....	216
Rex v. Wicks .....	R. & R. 149 .....	215
Rice v. George .....	20 Gr. 221 .....	257, 258, 260
Richards v. Davies .....	13 C. B. N. S. 69 .....	457
Richardson v. Horton .....	7 Beav. 112 .....	16
Riley to Streatfield, Re .....	34 Ch. D. 386 .....	567, 568, 647, 651, 657
Ripley v. McClure .....	4 Ex. 345 .....	373
Rippingall v. Rippingall .....	24 W. R. 967 .....	450
Risdale and Brush, Re .....	22 U. C. R. 124 .....	73, 79
River Weir Commission v. Adamson ....	2 App. Cas. 743 .....	630
Robb v. Murray .....	16 A. R. 503 .....	104, 106, 107
Roberts v. Great Western R. W. Co. ....	13 U. C. R. 615 .....	629
Robertson v. Bristol .....	11 Can. Law Times 61 .....	433
Robertson v. Maguire .....	Ct. of App. unreported .....	711
Robertson v. Robertson .....	25 Gr. 486 .....	4, 6, 8
Robertson v. Skelton .....	12 Beav. 363 .....	651
Robinson v. Flanders .....	29 Ind. 10 .....	468
Robinson v. Marchant .....	7 Q. B. 918 .....	206, 208, 211
Rockett v. Clippingdale .....	(1891) 2 Q. B. 293 .....	633
Rogers v. Van Valkenburg .....	20 U. C. R. 218 .....	561
Roscommon v. Fowke .....	6 B. P. C. 158 .....	56
Rosenbaum, Re .....	20 L. C. Jur. 165 .....	180
Rosenberg v. Northumberland Building Society .....	22 Q. B. D. 373 .....	241
Rosenburger v. Grand Trunk R. W. Co. ....	8 A. R. 482 .....	715
Ross v. Grand Trunk R. W. Co. ....	10 O. R. 447 .....	224, 225, 226
Ross v. Ross .....	20 Beav. 649 .....	662
Rossmore, Ex parte .....	8 Ir. R. Eq. 366 .....	508
Rotherham Alum, etc., Co., Re .....	25 Ch. D. 103 .....	604
Rowe v. School Board for London .....	36 Ch. D. 619 .....	564, 565, 566
Royal Bristol Permanent Building Society v. Bomash .....	35 Ch. D. 390 .....	564, 565, 647, 652
Royal British Bank, Re, Nicol's Case ..	3 DeG. & J. 387 .....	266
Royal Canadian Bank v. Carruthers ....	29 U. C. R. 283 .....	524
Royal Canadian Bank v. Miller .....	28 U. C. R. 593 ; 29 U. C. R. 266 ..	524
Royal Canadian Bank v. Ross .....	40 U. C. R. 466 .....	516
Russell v. The Queen .....	7 App. Cas. 829 .....	608, 611
Ryall v. Rowles .....	2 W. & T. L. C., 6th ed., 841 .....	579
Ryder v. Wombwell .....	L. R. 4 Ex. 38 .....	306



## S.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Sampson v. Hoddinott .....	1 C. B. N. S. 590 .....	230
Sanders v. Sanders .....	19 Ch. D. 373 .....	87
Saul v. Creditors .....	8 Martin (La.) 665 .....	516
Scane v. Duckett .....	3 O. R. 370 .....	293
School Section No. 24 v. Corporation of Burford .....	18 O. R. 546 .....	70
Schreiber v. Malcolm .....	8 Gr. 433 .....	417
Scott v. Guernsey .....	48 N. Y. R. 106 .....	258, 259, 261
Scott v. Scott .....	20 O. R. 313 .....	634, 635
Scott v. Scott .....	4 Sw. & Tr. 115 .....	450
Seward v. Vera Cruz .....	10 App. Cas. 68 .....	508
Seyton, Re .....	34 Ch. D. 511 .....	272
Shand v. Du Buisson .....	L. R. 18 Eq. 283 .....	615
Shane v. City of Moberly .....	79 Miss. 41 .....	139, 145
Shaw v. Nickerson .....	7 U. C. R. 541 .....	596
Shea v. City of Ottumwa .....	67 Iowa 39 .....	137, 147
Sheppard v. Sheppard .....	14 Gr. 174 .....	4
Sherry v. Oke .....	3 Dowl. 349 .....	647
Sherwin v. Shakspear .....	5 D. M. & G. 517 .....	647
Shoebrink v. Canada Atlantic R. W. Co. ....	16 O. R. 515 .....	136
Shorland, Ex parte .....	7 Ves. 88 .....	549
Sibbald v. Grand Trunk R. W. Co. ....	18 A. R. 184 .....	710
Sidebotham v. Barrington .....	3 Beav. 528 .....	53
Siebert v. Spooner .....	1 M. & W. 714 .....	437
Simmons and Dalton, Re .....	12 O. R. 505 .....	428, 429, 538, 539, 541, 543, 544
Simpson v. County Judge of Lanark, Re. ....	9 P. R. 358 .....	429
Sims v. Strachan .....	12 A. & E. 536 .....	549
Singer v. Elliott .....	4 Times L. R. 34, 524 .....	602, 603
Skilling v. Bollman .....	6 Mo. App. 76 .....	526
Skinner, Re .....	13 P. R. 276, 447 .....	289, 293, 295, 296, 297, 299
Slater v. Oliver .....	7 O. R. 158 .....	436
Smart and O'Reilly, Re .....	7 P. R. 364 .....	279, 280, 488
Smith v. Ashton .....	1 Ch. Cas. 263 .....	55, 56
Smith v. Baker & Son .....	5 Times L. R. 518 .....	304
Smith v. Benton .....	20 O. R. 344 .....	29
Smith v. Day .....	21 Ch. D. 421 .....	460
Smith v. Hall .....	25 U. C. R. 554 .....	284
Smith v. Lock .....	18 Mich. 56 .....	145
Smith v. McLellan .....	11 O. R. 191 .....	59
Smith v. Smith .....	8 O. R. 677 .....	456
Smith v. Smith .....	3 Giff. 271 .....	588
Smith v. White .....	L. R. 1 Eq. 626 .....	29, 32
Smith and Toronto, Re .....	10 C. P. 225 .....	328
Smith v. Port Dover and Lake Huron R. W. Co. ....	8 O. R. 256, 12 A. R. 288 .....	248
Smith, J. T., Trusts, Re .....	4 O. R. 518 .....	257, 259
Sneed v. Sneed .....	1 Ambler 64 .....	55
Solomons v. Medex .....	1 Stark. 191 .....	211
Somerville v. Hawkins .....	10 C. B. 583 .....	704
Spencer v. Harding .....	L. R. 5 C. P. 561 .....	442, 443
Spill v. Maude .....	L. R. 4 Ex. 232 .....	695, 697, 704
Spirett v. Willows .....	3 D. J. & S. 293 .....	438
St. Catharines Milling and Lumber Co. v. The Queen .....	14 App. Cas. 46 .....	358
St. Cuthbert's Lead Smelting Co. ....	35 Beav. 334; W. N. (1866), p. 91 ..	370

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
St. Louis v. Fitz .....	53 Mo. 582.....	327
Stammers v. Elliott.....	L. R. 4 Eq. 680, L. R. 3 Ch. 195.	588
Starr Bowkett Building Society and Sibuns Contract.....	42 Ch. D. 375.....	564
Stephen, Re.....	2 Phil. 562.....	295, 296
Stogdon v. Lee .....	(1891), 1 Q. B. 661 .....	377
Stokoe v. Cowan.....	29 Beav. 637 .....	549
Stone v. Commercial R. W. Co .....	4 M. & C. 122 .....	403
Strange v. Radford.....	15 O. R. 145 .....	548, 549
Stuart v. Bell .....	(1891), 2 Q. B. 341.....	690, 698, 703
Stuart v. Lovell.....	2 Stark. 93.....	699
Stumore, Weston & Co. v. Breen. ....	12 App. Cas. 698.....	526
Sturges v. Bridgman.....	11 Ch. D. 852.....	231
Suffell v. Bank of England.....	9 Q. B. D. 555.....	646
Supervisors v. United States.....	4 Wall. 435.....	177
Suter v. Merchants' Bank .....	24 Gr. 365.....	523
Swift v. Provincial Provident Institution	17 A. R. 66. ....	272, 273, 634, 638
Swire, Re.....	30 Ch. D. 239.....	596
Sykes v. Beaden.....	11 Ch. D. 170.....	32

## T.

Tanner v. Bissell.....	21 U. C. R. 553.....	591, 592, 593
Taylor, Ex parte.....	18 Q. B. D. 295.....	435
Taylor v. Chester.....	L. R. 4 Q. B. 309 .....	32
Taylor v. Church.....	I. E. D. Smith's Rep. N. Y. 279 .....	207, 209
Taylor v. Hawkins.....	16 Q. B. 308.....	704
Taylor v. Neate.....	39 Ch. D. 538.....	23
Taylor v. Vergette.....	7 H. & N. 143.....	564
Teasdale v. Sanderson.....	33 Beav. 534.....	257
Thomas v. Hilmer.....	4 U. C. R. 527.....	597
Thomas v. Inglis.....	7 O. R. 588.....	417
Thomas v. Robinson.....	3 Wend. (N. Y.) 268 .....	408
Thompson v. Brunskill.....	7 Gr. 542.....	102, 565
Thompson v. Molson's Bank.....	16 S. C. R. 664.....	524
Thomson v. Anderson .....	L. R. 9 Eq. 553.....	23
Thornton v. Adams.....	5 M. & S. 38.....	395
Thornton v. Capstock.....	9 P. R. 535.....	555
Thorp v. Brown.....	L. R. 2 H. L. 236.....	534
Thorpe v. Richards.....	15 Gr. 403.....	4
Tipling v. Cole, Re.....	21 O. R. 276 .....	280, 411, 486, 488
Tisdale v. Dallas.....	11 C. P. 238.....	98, 102
Todd v. Dun.....	12 O. R. 791, 15 A. R. 85 .....	695
Todd v. Hawkins.....	8 C. & P. 88.....	695, 697
Tollet v. Tollet .....	2 P. Wms. 489; W. & T., 6th ed., vol. 1 p. 272 .....	56, 58
Tomkins v. Saffery.....	3 App. Cas. 213.....	436
Tomkinson v. Consolidated Credit and Mortgage Corporation (Limited).....	62 L. T. R. 162.....	392
Toogood v. Spyring.....	1 C. M. & R. 181.....	696
Topham, Ex parte.....	L. R. 8 Ch. 614 .....	436
Township of Derby v. Alling.....	40 Conn. 410.....	137, 147
Trainor v. Holcombe.....	7 U. C. R. 548.....	105
Trotter v. City of Chicago .....	33 Ill. (App. Ct.) 206 .....	328
Trustees of the Ainleyville Congregation v. Grewer.....	23 C. P. 533 .....	35, 40, 41
Trustees of M. E. Church Hoboken v. Council of Hoboken.....	33 New Jersey L. R. 13.....	137, 148

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Tudor v. Anson .....	2 Ves. sr. 582 .....	56
Tuff v. Warman .....	2 C. B. N. S. 740 .....	715
Turner v. Cameron .....	L. R. 5 Q. B. 306 .....	419
Turner v. Thompson .....	13 P. D. 41 .....	340
Tweddle v. Atkinson .....	1 B. & S. 393 .....	248, 251, 252
Tylee v. Hinton .....	42 U. C. R. 228 .....	16
Tyler v. Wilkinson .....	4 Mason 401 .....	230
Tyson v. McLean .....	1 P. R. 339 .....	177

## U.

Uhlman v. The New York Life Ins. Co. .	109 N. Y. R. 432 .....	234
United States v. Rauscher .....	119 U. S. 407 .....	467, 475
United States v. Moses .....	4 Wash. C. C. 726 .....	561
Universal Non-Tariff Fire Ins. Co., Re. .	L. R. 19 Eq. 485 .....	312, 317

## V.

Valin v. Langlois .....	5 App. Cas. 115, 3 S. C. R. 1 ..	167, 545
Vallin v. Walsh .....	6 C. P. 459 .....	564
Vansittart v. Taylor .....	4 E. & B. 910 .....	108
Vickers v. Hand .....	26 Beav. 630 .....	647
Voters' Lists of Village of L'Original, Re	9 P. R. 425 .....	540
Vreeland v. Torrey .....	34 N. J. Eq. 312 .....	145

## W.

Waddell v. Waddell .....	2 Sw. & Tr. 587 .....	449
Wagstaff v. Anderson .....	5 C. P. D. 177 .....	526
Wake v. Hall .....	8 App. Cas. 195 .....	417, 418, 420
Wakelin v. London and South-Western R. W. Co. ....	12 App. Cas. 41 .....	301, 306, 715
Waldie v. Corporation of Burlington, Re	13 A. R. 104. . . . .	128, 129, 136, 142, 151
Walker v. Moore .....	10 B. & C. 416 .....	91
Walker v. Old Bradford Bank .....	12 Q. B. D. 511 .....	618
Walker v. South-Eastern R. W. Co. . .	L. R. 5 C. P. 640 .....	393
Wallace v. Hutchinson .....	3 O. R. 398 .....	376
Wallace v. Township of Lobo .....	11 O. R. 648 .....	66, 70
Wallbridge v. Brown .....	18 U. C. R. 158 .....	106, 107
Walmsley v. Milne .....	6 Jur. N. S. 125 .....	417
Walsh, Re .....	1 E. & B. 383 .....	598
Walters v. Nicholson .....	6 Dowl. 517 .....	626
Walters v. Walters .....	18 Ch. D. 182 .....	587
Warburton v. Sandys .....	14 Sim. 622 .....	35
Ward v. Countess of Dudley .....	57 L. T. 20 .....	417
Ward v. Davis .....	3 Sandford's S. C. R. (N. Y.). 502 .....	138, 139
Wardell v. Trenouth .....	24 Gr. 465 .....	102
Waring v. Ward .....	7 Ves. 337 .....	575
Warlow v. Harrison .....	1 E. & E. 316 .....	443
Warrington v. Warrington .....	8 C. B. 134 .....	92
Waterford Local Board of Health v. West Riding and Grimsby R. W. Co. .	35 L. J. N. S. Mag. Cas. 69 .....	671
Waterhouse v. Jamieson .....	L. R. 2 Sc. App. 29 .....	354
Waterhouse v. Stansfield .....	10 Ha. 254 .....	341
Waterhouse v. Wilkinson .....	1 H. & M. 636 .....	446
Watson v. Northern R. W. Co., Re. ....	5 O. R. 550 .....	403
Watson v. Severn .....	6 A. R. 559 .....	106

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Watt v. Clark .....	18 O. R. 602 .....	186
Webb v. Catchlove .....	82 L. T. R. 103 .....	555, 558
Webb v. Hughes .....	L. R. 10 Eq. 281 .....	49, 51
Webb v. Portland Manufacturing Co. ....	3 Summer 189 .....	230
Weir, Re .....	14 O. R. 389 .....	467, 468
Weir v. Canadian Pacific R. W. Co. ....	16 A. R. 100 .....	710, 711
Welsh v. Trevanion .....	15 Q. B. 751 .....	453
West Simcoe Election Case .....	1 Elec. Cas. 137 .....	190
Western, Counties Manure Co. v. Lawes Chemical Manure Co. ....	L. R. 9 Ex. 218 .....	261, 262, 263
Western Counties R. W. Co. v. Windsor and Annapolis R. W. Co. ....	7 App. Cas. 188 .....	628
Wheeler v. Montefiore .....	2 Q. B. 133 .....	19
Wheeler v. Wheeler .....	5 Lans. (N. Y. Sup. Ct. 1872) 355 ..	32
Whidden v. Jackson .....	18 A. R. 439 .....	599
White v. Bastedo .....	15 Gr. 546 .....	4
White v. Galbraith, Re .....	12 P. R. 513 .....	596, 597
Whitehead v. Bennett .....	27 L. J. N. S. Ch. 474 .....	420
Whiteley v. Adams .....	15 C. B. N. S. 392 .....	690, 695, 703
Whiting v. Hovey .....	12 A. R. 119 .....	556
Wiggins v. Armstrong .....	2 Johns. Ch. N. Y. 144 .....	118
Wilcocks v. Howell .....	5 O. R. 360 .....	696
Wilkes v. Gzowski .....	13 U. C. R. 308 .....	403
Willesford v. Watson .....	L. R. 8 Ch. 473 .....	23, 26
Williams, Re, Foulkes v. Williams. ....	42 Ch. D. 93 .....	57
Williams v. Balfour .....	18 S. C. R. 479 .....	575, 580, 581
Williams v. Ghenton .....	L. R. 1 Ch. 200 .....	647, 652
Williamson v. Williamson .....	7 P. D. 76 .....	451
Willson v. York .....	46 U. C. R. 289 .....	332, 334
Willyams v. Bullmore .....	33 L. J. Ch. 461 .....	32
Wilson v. Day .....	2 Burr. 827 .....	437
Wilson v. McGuire, Re .....	2 O. R. 118 .....	162, 167, 170, 174
Winter v. Blades .....	2 S. & S. 393 .....	652, 654
Wither v. King .....	3 Bro. P. C., 2nd ed., 135 .....	361
Wolff v. Ogilvy .....	12 P. R. 645 .....	108
Wood v. De Mattos .....	L. R. 1 Ex. 91 .....	115
Wood v. Waud .....	3 Ex. 748, 774 .....	230
Wood v. Wood .....	16 Gr. 471 .....	257
Woodall, Re .....	4 Times L. R. 352 .....	180, 467, 475
Woodhouse v. Murray .....	L. R. 2 Q. B. 634 .....	437
Worthington v. Scribner .....	109 Mass. 487 .....	561
Wright v. Hale .....	6 H. & N. 227 .....	108, 136
Wright v. Leys .....	8 O. R. 88 .....	222
Wright v. Tukey .....	3 Cush. 290 .....	145
Wylson v. Dunn .....	34 Ch. D. 569 .....	49, 52

## Y.

Yeatman v. Yeatman .....	L. R. 1 P. & D. 489 .....	451
Yeomans v. Corporation of Wellington. .	4 A. R. 301 .....	134
Young and Harston's Contract .....	31 Ch. D. 168 .....	564, 568, 651
Young v. Macrea .....	3 B. & S. 264 .....	262, 263
Young v. Midland R. W. Co. ....	16 O. R. 738 .....	226
Young v. Morden, Re .....	10 P. R. 276 .....	596
Young v. Smith .....	4 S. C. R. 510 .....	565



## ERRATA.

- Page 60. Insert as a heading "In the Chancery Division."
- " 91. Line 4 from top for "hereby" read "thereby."
- " 95. Line 5 of statement, for "1888" read "1886."
- " 96. Line 14 from top for "to" read "by."
- " 288. At end of case add "FALCONBRIDGE, J., took no part in the judgment."
- " 346. Line 9 from top for "2 M. & R." read "2 M. & K."
- " 387. Line 21 from top for "*Anderson v. Muskoka*," etc., read "*Cockburn v. Muskoka*," etc.
- " 490. Line 11 from top for "George" read "William."
- " 490. Line 3 from bottom for "favour" read "fraud."
- " 499. Line 9 of statement, for "the defendant" read "the defendant's employer."
- " 634. Line 4 from bottom for "Pr." read "P. R."

# REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON  
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

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[QUEEN'S BENCH DIVISION.]

PRATT V. BUNNELL.

*Dower—Bar of, in mortgage—Conveyance of equity of redemption by husband alone—Rights of wife—R. S. O. ch. 133, secs. 5, 6.*

Under secs. 5 and 6 of the Dower Act, R. S. O. ch. 133, a wife who joins to bar dower in a mortgage of land made by her husband to secure part of the purchase money is entitled to dower notwithstanding a conveyance by him of the equity of redemption without her concurrence. The wife so joining in the mortgage is not merely a surety for her husband; and she is entitled to dower out of the surplus only of the land or money left after satisfying the mortgage debt.

*Re Hague*, 14 O. R. 660; *Re Croskery*, 16 O. R. 207; and opinion of PATTERSON, J. A., in *Martindale v. Clarkson*, 6 A. R. 1, dissented from. Judgment of ARMOUR, C. J., reversed.

THIS was an action for foreclosure or sale of certain free-  
hold lands comprised in a mortgage made by the defend-  
ant William T. Bunnell to one Benning to secure \$5,000,  
dated 22nd December, 1886, and subsequently assigned to  
the plaintiff. Harriet Bunnell, also a defendant in this ac-  
tion, the wife of the mortgagor, joined in the mortgage for  
the purpose of barring her dower. On 18th February,  
1890, the mortgagor made an assignment to the defendant  
Gordon for the benefit of his creditors. The defendant  
Harriet Bunnell by her answer claimed to be entitled to

Statement. an inchoate right of dower and to be entitled to redeem in respect of it. The defendant Gordon appeared and admitted the plaintiff's statements and asked that no order should be made against him. Upon these pleadings the action was entered for trial by the plaintiff and came on at the Ottawa Winter Assizes on 10th January, 1891, before ARMOUR, C. J.

The mortgage was proved and was shewn to have been given to secure payment of the balance of purchase money of a property sold by the mortgagee to the mortgagor for \$6,000, upon which \$1,000 had been paid down; it was proved that \$1,500 had been since paid upon the mortgage.

The following judgment was subsequently given :—

ARMOUR, C. J. :—

I allow the amendments to be made asked for by any party at the hearing.

The defendant Harriet Bunnell is, I think, clearly entitled to the benefit of R. S. O. ch. 133, secs. 5, 6, and 7, notwithstanding the fact that her husband has conveyed his equity of redemption in the mortgaged lands to the defendant Gordon, for the statute applies to all cases, and as well to where the husband remains the mortgagor as to where he has assigned his equity of redemption without his wife joining in the conveyance, and so far as *Calvert v. Black*, 8 P. R. 255, is an authority to the contrary, it cannot be supported. The effect of the statute is to treat a wife joining in a mortgage, containing a bar of dower, made by her husband of his real estate as mortgaging her inchoate right of dower as a surety for her husband. And in the event of a sale of such real estate under a power of sale contained in the mortgage or under legal proceedings taken upon such mortgage to realize the mortgage money, she is entitled to have the money arising from such sale, after payment of the mortgage money and costs, to the extent of one-third of the value of the said real estate, as

ascertained by the said sale, paid into Court, there to remain to answer her dower in case she shall become entitled thereto. Judgment.  
Armour, C.J.

The learned Chancellor has discussed these provisions of the statute in two cases before him, *Re Croskery*, 16 O. R. 207, and *Ayerst v. McClean*, 14 P. R. 15, and in his views as expressed therein I, in the main, agree.

There will be the usual decree for a sale of the mortgaged lands, with reference to the Master at Ottawa. The money arising from such sale, after payment of the amount found due in respect of the plaintiff's mortgage and the costs, and after the payment of the costs of the defendant Harriet Bunnell, shall, to the extent of one-third of the value of the mortgaged premises, as ascertained by the sale, be paid into Court, there to remain to answer the dower of the said Harriet Bunnell, in case she shall become entitled thereto, and, subject to such dower, to belong, with any surplus money over and above such one-third, to the defendant Gordon as assignee, as in the pleadings mentioned.

At the Hilary Sittings of the Divisional Court, 1891, a motion was made by the defendant Gordon, the assignee of the mortgagor, to vary this judgment by declaring Harriet Bunnell entitled to dower only in the surplus after paying the mortgage debt and costs; by directing that the money set apart as representing her dower should be paid into Court to the joint credit of the assignee and Harriet Bunnell, and that the interest on it should be paid out to the assignee during the life time of the mortgagor; or that a sum in gross should be fixed and paid out to her, and that the balance should be paid to the assignee; and also by directing that Harriet Bunnell should bear her own costs.

The motion was argued on 11th February, 1891, before the Divisional Court (FALCONBRIDGE and STREET, JJ.)

*Snow*, for the defendant Gordon. Mrs. Bunnell is not a necessary party to this action, the action being by a mortgagee for foreclosure: *Moffatt v. Thomson*, 3 Gr. 111. The learned Chief Justice has gone too far in his judgment;



**Argument.**

he has declared the rights of the parties instead of referring it to the Master, and has allowed Mrs. Bunnell one-third of the whole land for her life. She is entitled only to dower in the equity of redemption after satisfying the mortgage. I refer to *Sheppard v. Sheppard*, 14 Gr. 174; *Thorpe v. Richards*, 15 Gr. 403; *White v. Bastedo*, *ib.* 546; *Campbell v. Royal Canadian Bank*, 19 Gr. 334; *Robertson v. Robertson*, 25 Gr. 486, 496; *Hawley v. Bradford*, 9 Paige 199; *Re Hague*, 14 O. R. 660. The defendant Gordon, the assignee, should be entitled to interest during the husband's life in whatever sum is left after satisfying the mortgage: R. S. O. ch. 133, secs. 1, 5, 6, 7; *Re Croskery*, 16 O. R. 207. See *Fleury v. Pringle*, 26 Gr. 67, on which secs. 5 and 6 are founded. The defendant Gordon should not have been ordered to pay costs, which he practically is.

*Langton*, Q.C., for the defendant Harriet Bunnell. The mortgagee is the first incumbrancer; the dowress the second. The Court will not review the trial Judge's order as to costs, and it is a reasonable one. The dowress is dowerable out of the whole land except as against the mortgagee. *Re Croskery*, 16 O. R. 207, shews the law. *Potts v. Meyers*, 14 U. C. R. 499, was a case where the wife did not join in the mortgage to the vendor. I refer also to *Norton v. Smith*, 20 U. C. R. 213; *Heney v. Low*, 9 Gr. 265. The mortgagee is protected; he is entitled to the first charge; but the rights of no one else are provided for; and it follows that, after satisfaction of the mortgage, the mortgagee is entitled to her whole dower out of the land: *Robertson v. Robertson*, 25 Gr. at pp. 504, 505; *Re Croskery*, 16 O. R. 207; *Ayerst v. McClean*, 14 P. R. 15; *Martindale v. Clarkson*, 6 A. R. at p. 6. The interest should be allowed to accumulate for the benefit of the dowress.

*Middleton*, for the plaintiff. The wife is properly made a party under *Ayerst v. McClean*, 14 P. R. 15. The plaintiff should be allowed to go on and sell without regard to the dispute between the defendants.

*Snow*, in reply. The wife is not a surety in this case.

The mortgage was not to secure a loan, but part of the <sup>Argument.</sup> purchase money. It is unjust and inequitable to give the wife what her husband never had.

March 6, 1891. The judgment of the Court was delivered by

STREET, J.:—

The rights of Harriet Bunnell are governed by secs. 5 and 6 of ch. 133, R. S. O., which are as follows :

5. No bar of dower contained in any mortgage, or other instrument intended to have the effect of a mortgage or other security, upon real estate, shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument.

6. In the event of a sale of the land comprised in such mortgage or other instrument, under any power of sale contained therein or under any legal process, the wife of the mortgagor or grantor who shall have so barred her dower in such lands, shall be entitled to dower in any surplus of the purchase money arising from such sale, which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which such surplus purchase money shall be derived had the same not been sold.

At the time of the passing of this statute it had been held :

1st. That where a wife joined in a mortgage given to secure the unpaid purchase money of land bought by her husband she was entitled to a right of dower, not in the whole value of the land, but only in the proceeds of the sale after payment of the incumbrance : *Campbell v. Royal Canadian Bank*, 19 Gr. 334.

2nd. That where the mortgage was not given to secure unpaid purchase money she was entitled to have her dower

Judgment.

Street, J.

in the whole value of the land covered by the mortgage paid to her out of the surplus proceeds after payment of the incumbrance: *Doan v. Davis*, 23 Gr. 207; *Robertson v. Robertson*, 25 Gr. 486.

3rd. That after the wife had joined with her husband to bar her dower in a mortgage by him of the legal estate, he might convey the equitable estate free of her dower in it without her concurrence: *Fleury v. Pringle*, 26 Gr. 67; the contrary having been previously held by Mowat, V.C., in *Forrest v. Laycock*, 18 Gr. 611.

The Act above mentioned was passed in 1879, presumably to settle the law upon these questions; it contains no recitals and its meaning is only to be gathered from its language; it comes up now for the first time, I think, for construction before a Divisional Court.

Section 5 appears to settle conclusively in favour of the wife the question as to the right of the husband to convey away, without his wife's concurrence but free from her dower, the equitable estate remaining in him after a mortgage in which she had joined; because, to hold otherwise would be to hold that the bar of dower in the mortgage operated not only to give full effect to the right of the mortgagee under the mortgage, but also enabled the husband to deal with the equity left in him to the prejudice of his wife's dower in it; and this would be contrary to the express provision in the section. An equity of redemption created in this way, that is, by a mortgage of the husband's legal estate, the wife joining to bar dower is, therefore, under section 5 an exception to the general rule contained in section 1 of the same Act which gives a wife dower only in those equitable estates of which her husband dies seized. The right of Mrs. Bunnell to dower was, for this reason, not interfered with by the fact that her husband assigned his equity of redemption in the lands here in question, and the question raised by the parties and adjudicated upon by the Chief Justice is as to the extent of her right. It is a question which in such cases has usually been left to be considered after the sale of the

property, but no objection is raised upon this motion paper to its being disposed of at the present stage.

Judgment.

Street, J.

It has been argued and almost assumed that the effect of the two sections of the Dower Act above set forth is to place a wife who has joined to bar her dower in a mortgage of her husband's land in the position of a surety for him. An examination and application to practical tests of the language of the sections shews, however, that no such meaning lurks in it, and it would surely be needful that very definite expressions should be used before we could come to a conclusion which, carried to its logical result, would entitle every woman whose dower has been foreclosed by a mortgage to come into competition with her husband's creditors to the extent of its value.

The meaning of these sections may, perhaps, most readily be appreciated by a practical illustration. Suppose a farm of one hundred acres worth \$10 an acre to be subject to a mortgage from a husband, upon which is due for principal, interest, and costs, \$800, and that his wife has joined to bar her dower.

If the mortgagee forecloses the mortgage the wife loses her dower absolutely and has no recourse against any one for it.

If the mortgagee sells eighty acres and thus satisfies his mortgage, the wife loses her dower in the eighty acres; the remaining twenty acres is reconveyed to her husband and she has her dower in it, but dower in twenty acres not one hundred acres.

If the mortgagee sells the whole one hundred acres, his mortgage money is paid in full, and he has a surplus of \$200; this is the case provided for specially by the 6th section. That section directs that in such a case the wife shall be entitled to dower in this surplus—not in the whole value of the land, to be paid out of this surplus—to the same extent as she would have been entitled to dower in the land from which the surplus was derived, if it had not been sold.

To apply this to the case I have put, the widow is entitled to dower in the \$200 surplus to the same extent as she would



Judgment.  
Street, J. have been entitled to dower in the twenty acres from which the surplus was derived, if it had not been sold. The meaning of the expression "dower" is not to be extended so as to mean anything more than the interest or estate described by that word, and when the Act says that a wife is to have dower in money, which is taken to represent the land which has produced it, it cannot mean that she is to have a greater share of the money than as dowress she would have been entitled to in the land.

In the cases I have put the 5th section is complied with, for the bar of dower operates to no greater extent than is necessary to give full effect to the rights of the mortgagee; but in order to give full effect to those rights, it is necessary that the dower of the wife should be forever barred in the land which the mortgagee takes or sells in satisfaction of the full amount of his mortgage debt, and there is nothing in the Act which says that, once having been barred to this necessary extent, it is to be revived and shifted bodily as a charge upon the land not sold, or the money which the land unnecessarily sold produces.

Other cases may be put to shew still more plainly the anomalies which would result from holding the wife entitled to dower in the whole mortgaged premises, to be charged upon the surplus. Suppose the mortgagee in the case I have supposed, to sell ninety acres of the land for \$900, there would then be a surplus of \$100 in cash and ten acres of land. Is her dower in the cash and in the land to be estimated upon different bases? Is she to have dower in the ninety acres sold paid to her out of the \$100 cash, and her thirds only in the ten acres of land?

It may be assumed that this same anomaly would have arisen under the law as declared in *Robertson v. Robertson*, 25 Gr. 486, as undoubtedly it would, but it is safer to assume that the Act in question was passed to correct anomalies, and not to perpetuate them.

The construction of sec. 6, which is relied on as giving to a wife dower out of the surplus in the whole of the land sold, seems to require a forced interpretation to be put upon

the language used. In the first place, as I have already suggested, "dower in the surplus" must be interpreted as meaning "dower in the whole, to be paid out of the surplus;" and it is said that this meaning is to be found in the words used because the extent is subsequently defined, to which the dower is to go, that is to say, to the same extent as the wife would have been entitled to dower in the land from which the surplus purchase money was derived had the same not been sold; and that the surplus purchase money is derived from the whole of the land sold and not from any part of it.

Judgment.

Street, J.

But in the first place, the section speaks of the sale of the land covered by the mortgage, and of the purchase money arising from that sale, and then it speaks of a portion of the purchase money, viz., the surplus, and of the land from the sale of which that portion of the purchase money is derived; had it been intended to measure the extent of the wife's dower in the surplus by that of her dower in the whole of the land sold, there would have been no necessity for any reference to the land from which the surplus was derived, as distinguished from the whole land sold. Then supposing "the land from which the surplus purchase money was derived" to mean the whole of the land sold, it is impossible to say what the wife's right to dower would have been in that land *had it not been sold*. Had it not been sold, it may be assumed, in the absence of any other legislative suggestion, that it would still have remained subject to the mortgage in which the wife had joined, with all the possibilities of foreclosure and non-payment, so that the expression "had it not been sold" must be construed "had it not been mortgaged" or "had the mortgage been paid off," in order to make it suit the interpretation sought to be placed upon the section.

The interpretation which I have ventured to think is the proper one, with much hesitation, having in view the powerful array of judicial opinion opposed to it, requires no forced construction of a word in the Act and gives rise to no anomalies in its results. The opposite view has been

Judgment. taken by Patterson, J., in *Martindale v. Clarkson*, 6 A. R.  
Street, J. 1 ; by the Chancellor in *Re Croskery*, 16 O. R. 207 ; by Ferguson, J., in *Re Hague*, 14 O. R. 660 ; and by the Chief Justice of this Division in the present case.

I am of opinion, for the reasons I have given, that one-third of any surplus arising from the sale of the mortgaged premises here should be paid into Court to the credit of this cause and should remain there during the joint lives of Mr. and Mrs. Bunnell to secure her dower, the interest meantime being paid out to the defendant Gordon in trust for Bunnell's creditors, and that after the death of Bunnell, in case his wife survives, the interest should be paid to her during her life, subject to which the principal should be declared the property of Gordon in trust for the creditors. The costs to the hearing of Mrs. Bunnell and of Gordon should be paid out of the latter's two-thirds share of the surplus proceeds ; and Mrs. Bunnell should pay Gordon's costs of the present motion.

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## [QUEEN'S BENCH DIVISION.]

## DELANEY V. CANADIAN PACIFIC RAILWAY COMPANY ET AL.

*Mortgagor and mortgagee—Vacant land—Constructive possession of mortgagee—Statute of Limitations—Presumption of payment—Arrears of interest—R. S. O. ch. 111, sec. 17—Redemption—Rate of interest post diem.*

Where a right of entry has accrued to a mortgagee without actual entry by him and the mortgaged lands are subsequently left vacant before a title by possession has been acquired, by anyone, the constructive possession thereof is in the mortgagee, and the Statute of Limitations does not run against him so as to extinguish his title to the lands; the mortgage being in default and no presumption of payment arising.

An action of trespass to vacant lands will lie by the mortgagee thereof.

In such an action, after the lands had been vacant for many years, and the mortgagee had then made an actual entry and was subsequently dispossessed, and the lands taken by a railway company for the purposes of their undertaking, he was held entitled to recover the value of the land as damages, to be held by him as security for his mortgage moneys, the mortgagor being entitled to redeem in respect of the damages as he would have been in respect of the land.

R. S. O. ch. 111, sec. 17, which provides that no more than six years' arrears of interest upon money charged upon land shall be recoverable, only applies where a mortgagee is seeking to enforce payment, out of the lands, of his mortgage money and interest, and does not apply to an action for redemption or to actions similar in principle.

In this action the mortgagee was held entitled to interest at the rate fixed by the mortgages up to the maturity thereof, and afterwards at the rate of six per cent. ; in all for about sixteen years.

Decision of STREET, J., varied.

THE plaintiff being in possession of the lands in the Statement. pleadings mentioned, the defendants entered thereon and ejected him and took possession thereof, and this action was brought to recover damages for the said wrongs, and for an injunction, and for restitution of the possession, and was tried at the sittings of this Court in Toronto, in March, 1890, before STREET, J.

*Arnoldi*, Q. C., and *Bristol*, for the plaintiff.

*Ritchie*, Q. C., and *Angus MacMurchy*, for the defendants.

Donovan, a third party, appeared in person.



Judgment. December 6, 1890. STREET, J. :—

Street, J.

Action tried before me at the Toronto Assizes on 6th and 7th March, 1890.

The plaintiff claimed to be mortgagee in possession under two mortgages from Patrick Hartnett to himself of the lands in question.

The first, dated 30th June, 1873, for \$200, principal, payable 30th June, 1875, with interest half-yearly on 30th December and 30th June, at twelve per cent.; the first payment of interest to become due on 30th December, 1873.

The second, dated 8th September, 1874, for \$142, principal, and interest at twelve per cent., to become due 30th June, 1875.

One year's interest, due 30th June, 1874, had become due and been paid upon the first mortgage on 8th September, 1874; nothing had been paid upon the second mortgage.

The possession of the land was vacant from about the year 1877, until shortly before the 30th June, 1885, when the mortgagee took possession and continued in possession as mortgagee until the defendants the Canadian Pacific Railway Company took possession in November, 1888, and built their line of railway through the land, claiming to be the owners of the equity of redemption by a series of conveyances under the heir-at-law of the mortgagor Hartnett. By arrangement between the parties the value of the land was fixed at \$1,200, and that sum was paid into Court by the defendants or some of them.

I found all the facts at the trial and reserved the question as to the amount which the plaintiff should recover.

I see no reason to change the opinion I then expressed, that the plaintiff's rights under the first mortgage were barred before he entered into possession of the land: his right to make an entry first accrued upon default being made in payment of the instalment of interest which became due on 30th December, 1874, and his right was barred on 30th December, 1884, and he acquired no new right when the principal secured by the mortgage fell due

on 30th June, 1875: sec. 4, ch. 111, R. S. O.; sub-sec. 3, sec. 5, ch. 111, R. S. O.; sub-secs. 10 and 11, sec. 5, ch. 111, R. S. O.; sec. 22, ch. 111, R. S. O.; *Doe Roylance v. Lightfoot*, 8 M. & W. 553. Judgment.  
Street, J.

But the plaintiff is entitled to recover \$142, being the principal secured by the second mortgage, with six years' arrears of interest back from the issue of the writ, and interest of course since that date, and all to be computed at six per cent. per annum. The cases of *Howeren v. Bradburn*, 22 Gr. 96, and *Macdonald v. McDonald*, 11 O. R. 187, cited by counsel for the plaintiff, do not entitle him to more than six years' arrears of interest; those cases were cases between mortgagor and mortgagee, where, to avoid circuity of action, the mortgagee was allowed as against the mortgagor to claim under the covenant in the mortgage the full amount payable under it. Here the mortgagor is not the owner of the equity of redemption and neither he nor his heirs are parties to the action. There can, therefore, be no claim under the covenant. The plaintiff is, however, entitled to add the \$75 taxes which he paid to Donovan, with interest at six per cent., and any other taxes he may have paid, with interest at six per cent., and the costs of this action. If he has taken any proceedings under the power of sale in the mortgage, the costs of these may also be added.

If there is any dispute, the amount may be ascertained by the Registrar before the judgment is taken out, but I think it unnecessary that the parties should be put to the expense of a formal reference to ascertain the amount due. The judgment will contain an order for the payment, out of the moneys in Court, of these sums and that upon payment of them the defendants are entitled to hold the land clear of any claims of the plaintiff under the mortgages in question or either of them. The balance of the money in Court should be paid out to the persons by whom it was paid in.

## Statement.

At the Hilary Sittings of the Divisional Court, 1891, the plaintiff moved to set aside or vary the judgment of STREET, J., on the following grounds:—(1) The learned Judge should have found on the evidence that Patrick Hartnett, the mortgagor, died testate, and that the defendants did not prove their title to redeem, and their taking possession of the said lands was a trespass. (2) In any event, if the defendants were entitled to set up the title derived from John Hartnett under the conveyance to Joseph A. Donovan, the real consideration for which was only \$10, as stated in the evidence of said Donovan, and not \$300, as untruly stated in the said conveyance, it appeared that Patrick Hartnett left two sons, and the title of the other son, if any, was outstanding and not represented by the defendants. (3) The evidence disclosed that the plaintiff was in possession of the said lands and that the defendants without leave or license took possession of the said lands and trespassed thereon, and the learned Judge should have so found and should have put the plaintiff into the same position as he occupied before the trespass of the defendants, and should have given him all the rights, and he was entitled in this action to all the rights, which he would have had if the defendants were, as they in fact were, coming in to redeem the plaintiff's mortgages, the plaintiff being in possession of the lands; and on this principle the defendants coming in to redeem, the plaintiff under these circumstances was bound to pay the principal moneys and interest secured by the plaintiff's mortgages in full, and the learned Judge should have so found. (4) The learned Judge erred in holding that the first mortgage to the plaintiff was barred by the Statute of Limitations, the plaintiff's title and possession were, as shewn upon the evidence, a complete answer to the defence of the Statute of Limitations. (5) The learned Judge erred in finding that any part of the interest secured by the second mortgage was barred by the Statute of Limitations. (6) In any event, the Statute of Limitations did not run against the plaintiff from the time when

the principal money became payable under the accelerating **Statement.** clauses in the mortgages respectively. The right to payment of the principal money under the said accelerating clauses in the said two mortgages accruing upon default of payment of interest was a forfeiture, or in the nature of a forfeiture, of which the plaintiff was not bound to take advantage, and he did not take advantage of the same, and the defendants were not entitled to accelerate the application of the Statute of Limitations by reason of default of those under whom they claimed creating forfeiture. (7) In any event, the learned Judge erred in allowing arrears of interest only at six per cent. per annum; he should have allowed interest at the rate mentioned in the mortgage. (8) Vacant possession of the land should have been attributed to the plaintiff's mortgage, and the plaintiff, by the notice for sale and otherwise, being prior to the year 1885, had such possession of the land as prevented the application of the Statute of Limitation. (9) And on the ground that the judgment was against the evidence and the weight of evidence.

On the 12th February, 1891, the motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J.

*Arnoldi*, Q. C., for the plaintiff. The plaintiff's rights are not barred by the Statute of Limitations. Notices were put up by the plaintiff on the vacant land, which, according to *Donovan v. Herbert*, 4 O. R. 635, were equivalent to possession, and there was no break from 1877 until forcible possession was taken by the defendants. When the limitation clause, sec. 23 of R. S. O. ch. 111, says "present right," it means an absolute right to receive the mortgage money. [*Ritchie*, Q. C., for the defendants, referred to *Fletcher v. Rodden*, 1 O. R. 155]. As to the effect of the accelerating clause in the mortgages, see the long form in R. S. O. ch. 107, para. 16. Chy. G. O. 461 (3rd June, 1853) is practically incorporated into every mortgage. A party is not bound to take advantage of a forfeiture. Upon all these considerations, the limitation clause



**Argument.**

does not apply, and the plaintiff is entitled to the moneys secured by both mortgages. There was a new right of action on every default, and the plaintiff is entitled to recover on the last as well as on the first. I refer to *Tylee v. Hinton*, 42 U. C. R. 228; *Heath v. Pugh*, 6 Q. B. D. 345; 7 App. Cas. 235. The trial Judge has allowed the plaintiff only six years' interest. He held that the right to possession accrued when the instalment of December, 1874, fell due and was not paid. But the plaintiff has been in possession since 1877 and should have full interest and principal: *Edmunds v. Waugh*, L. R. 1 Eq. 418; 2 W. & T. L. C., 6th ed., p. 1229. The rule as to the effect of alienation by the heir is stated in Seton on Decrees, 4th ed., p. 814; *Richardson v. Horton*, 7 Beav. 112. As to the rate of interest after maturity, I refer to *Mellersh v. Brown*, 45 Ch. D. 225.

*Ritchie*, Q. C., for the defendants. Constructively the mortgagor would be in possession till the mortgagee did some act of possession. I refer to *Court v. Walsh* 1 O. R. 167; *Cole on Ejectment*, p. 67; *Airey v. Mitchell*, 21 Gr. at p. 513; R. S. O. ch. 111, sec. 4; sec. 3, sub-secs. 5, 10, 11; sec. 22; and as to the rate of interest after maturity of the mortgage, *Powell v. Peck*, 12 O. R. 492; 15 A. R. 138; *Grant v. People's Loan Co.*, 17 A. R. 85, affirmed in Supreme Court of Canada (not yet reported).

*Arnoldi*, in reply, referred as to the rate of interest to *Muttlebury v. Stevens*, 13 O. R. 29; *London & Canadian L. & A. Co. v. Smythe*, 7 C. L. T. Occ. N. 17.

March 6, 1891. The judgment of the Court was delivered by

ARMOUR, C. J. :—

Patrick Hartnett was the owner in fee of the lands in question, and, being such owner, on the 30th day of June, 1873, conveyed the same to the plaintiff by way of mortgage for securing the sum of \$200, with interest at twelve

per cent. per annum, payable on the 30th day of June, 1875, <sup>Judgment.</sup> with interest half-yearly on the 29th days of December <sup>Armour, C.J.</sup> and June in each year.

Subsequently and on the 8th day of September, 1874, the said Patrick Hartnett conveyed the said lands to the plaintiff by way of mortgage for securing the sum of \$142, with interest at twelve per cent., payable on the 30th day of June, 1875.

In the sum secured by the latter mortgage was included the interest then overdue in respect of the former, so that when the latter mortgage was given the overdue interest in respect of the former mortgage was paid. So that at that time there was yet to fall due on the former mortgage a gale of interest on the 29th of December, 1874, and a gale of interest on the 29th day of June, 1875, and the principal money on the 30th day of June, 1875, and by the latter mortgage the whole sum thereby secured, principal and interest, was to fall due on the 30th day of June, 1875.

Patrick Hartnett was living on the lands in question at the time these mortgages were given, and continued to reside on them until his death, which took place in 1874: shortly after these mortgages were given, and after his death a son of Patrick Hartnett, one Daniel Hartnett, continued to reside on the said lands till some time in the year 1877, when he abandoned possession of them, and the lands became vacant, the dwelling thereon rotted down and was carried away, and the lands continued vacant until the defendants entered upon them and took possession of them. The plaintiff, however, as found by the learned Judge, shortly before the 30th June, 1885, made an actual entry upon the said lands and enclosed them with a fence, and kept possession of them in that way, keeping off intruders, until the defendants entered and took possession.

The learned Judge held that the plaintiff's right of entry accrued under the former mortgage when the gale of interest fell due thereon on the 29th day of December,

Judgment. 1874, and the plaintiff's actual entry on the lands not having been made until more than ten years had thereafter elapsed, the plaintiff's title to the lands under that mortgage was extinguished.

Both these mortgages were made under the Act respecting Short Forms of Mortgages, R. S. O. ch. 107, and contained all the covenants and provisoes in that Act contained, but neither of them was executed by the plaintiff.

If by these mortgages no redemise was created and there was nothing therein to prevent the plaintiff taking possession of the mortgaged lands before default, then his right of entry accrued upon the making of them and the statute then began to run: *Doe Roylance v. Lightfoot*, 8 M. & W. 553; *Doe Parsley v. Day*, 2 Q. B. 147.

If, however, by these mortgages a redemise was created, or by reason of the provisions thereof the plaintiff was prevented from taking possession of the mortgaged lands until default, default did not occur in the latter mortgage until the 30th June, 1875, and until that time his right of entry did not accrue, and the statute did not begin to run till that date, and so the actual entry was in time. Having bound himself by the provisions of the latter mortgage not to take possession of the mortgaged lands until the 30th of June, 1875, he could not as against this take possession of the mortgaged lands until that date by reason of any default in the former mortgage.

*James v. McGibney*, 24 U. C. R. 155, would seem to be opposed to this view, but if that decision can be supported, the facts are clearly distinguishable. The two mortgages in that case were to different persons, and default was made in the prior mortgage before the mortgagee in the second mortgage obtained an assignment of it, and for all that appears the mortgagee in the second mortgage may not have been aware of its existence when he took his mortgage, but in this case both mortgages are to the same person, and he with full knowledge of the provisions of the former mortgage provided by the latter mortgage that he would not take possession until default was made in it,

and he took the former mortgage out of default by including in the latter mortgage the overdue interest on the former mortgage. Judgment.  
Armour, C.J.

But whether the plaintiff's right of entry accrued upon the making of the mortgages or upon default being made therein, makes, in my opinion, no difference, for as soon as Daniel Hartnett abandoned the possession in 1877, and the lands became vacant, the constructive possession thereof was in the plaintiff, and the statute did not run against him so as to extinguish his title to the land: *Agency Co. v. Short*, 13 App. Cas. 793.

No presumption of the payment of these mortgages arose in this case, for the plaintiff had twenty years to bring his action upon the covenants for payment of the mortgage moneys, and it was proved that the mortgage moneys had never been paid: *Allan v. McTavish*, 2 A. R. 278; *Doe McLean v. Fish*, 5 U. C. R. 295; *Mahar v. Fraser*, 17 C. P. 408.

The cases in England such as *Wheeler v. Montefiore*, 2 Q. B. 133, where it has been held that trespass will not lie by a mortgagee until entry are all cases where the mortgagor was in actual possession at the time of the committing of the trespass and do not apply to cases of vacant possession: *Mann v. English*, 38 U. C. R. 240; *Heck v. Knapp*, 20 U. C. R. 360.

In cases of vacant possession, as was pointed out in *Agency Co. v. Short*, there is no one against whom the mortgagee can bring an action, and he cannot make an entry upon himself, and in such cases trespass would be maintainable by the mortgagee.

The next question is, to what amount of arrears of interest upon his mortgages is the plaintiff entitled, and at what rate is it to be calculated?

The statute provides, R. S. O. ch. 111, sec. 17, that "no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by



Judgment. any distress, or action, but within six years next after the  
Armour, C.J. same respectively has become due, or next after any acknowledgment of the same in writing has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent."

This is not an action to recover arrears of interest in respect of any sum of money charged upon any land, but an action of trespass in which the value of the lands of which the plaintiff has been forever deprived is recoverable as damages, and the damages so to be recovered would be held by him, as the lands were held, as security for his mortgage moneys, and the mortgagor would be put to his redemption in respect of the damages so to be recovered, as he would have been in respect to the lands which those damages represented.

The defendants have paid the value of the lands into Court, and the question, therefore, is, what arrears of interest the plaintiff is entitled to retain out of these moneys in respect of his mortgage moneys; and this is to be determined upon the same principles as if a bill had been filed by a mortgagor against a mortgagee in possession to redeem the mortgaged lands.

The words of the statute clearly do not include an action by a mortgagor against a mortgagee to redeem the mortgaged lands, and the principle of the decisions of *Edmunds v. Waugh*, L. R. 1 Eq. 418, and *Re Marshfield*, 34 Ch. D. 721, shews that the statute does not apply to such a suit.

Is a mortgagee who has been in possession of mortgaged lands from which no income was derivable for nine years to be entitled on redemption to only six years' arrears of interest? I think it plain that the statute is only applicable when the mortgagee is seeking to enforce payment out of the land of his mortgage money and interest, by action.

The distinction between proceedings by a mortgagee and those by a mortgagor was pointed out by Vankough-

net, C., in *Coldwell v. Hall*, 9 Gr. 110; and in *Ford v. Allen*, 15 Gr. 565, he followed *Edmunds v. Waugh*. Judgment.  
Armour, C.J.

I am of the opinion, therefore, that the plaintiff is entitled to retain out of the moneys in Court the mortgage moneys secured by both his mortgages, less the year's interest on the first mortgage included in the second mortgage, and all arrears of interest thereon, and that the interest on the principal moneys thereby secured must after the date when they become payable bear interest at the rate of six per cent. per annum only: *Grant v. People's Loan and Deposit Co.*, 17 A. R. 85.

The judgment of my brother Street will be varied, therefore, in accordance with this judgment with costs.

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## [CHANCERY DIVISION.]

## MITCHELL V. LISTER.

*Partnership—Receiver—Failure of partners to agree on Referee as provided in articles.*

Where partnership articles provide that on dissolution the partners shall appoint a person to collect the accounts and settle the partnership affairs, the Court will, on failure of the parties to agree on some person, appoint a receiver.

## Statement.

THIS was a motion for the appointment of a receiver, made under circumstances stated in the judgment, where also the contentions of counsel and the authorities cited on the argument sufficiently appear.

The motion came on for argument on February 24th, 1891, before ROBERTSON, J.

*Worrell, Q. C.*, for the plaintiff.

*Armour, Q. C.*, for the defendant.

February 26th, 1891. ROBERTSON, J. :—

Motion for appointment of a receiver of the property and assets of the late partnership of "Mitchell and Lister Company," referred to in the statement of claim, and for an order directing the sale of the stock-in-trade of the partnership, etc. The action is for an account of the partnership dealings between the plaintiff and defendant.

The plaintiff and defendant entered into an agreement under seal, bearing date January 2nd, 1889, to become copartners in the general business of importers in Toronto, under the name, style, and firm of "Mitchell and Lister Company," for three years from January 1st, 1889. The agreement contained the provision that at any time during the term either of said copartners shall be at liberty to determine the said copartnership, by giving to the other of them six months' notice of his intention to determine the same, etc.

The plaintiff determined the partnership, which took Judgment.  
effect on January 31st, 1890.

Robertson, J.

The 13th paragraph of the articles of copartnership is in these words: "That at the expiration of this copartnership the parties hereto shall appoint some fit and proper person to get in all outstanding accounts, and to settle and adjust the partnership concerns."

The parties have been unable to agree upon the "fit and proper person," etc., hence this action.

Mr. Armour, for the defendant, contends that the plaintiff is bound to agree to the appointment of such person, and a correspondence has taken place between the respective solicitors on this point; but as before stated they have not been able to agree. Mr. Armour contends that the Court should now stay proceedings until they do agree; or if the plaintiff persists in going on with his action, that he shall do so at his own costs and expenses, etc.; and cites in support of his contention, *Davis v. Amer*, 5 Drew. 64; *Law v. Garrett*, 8 Ch. D. 26; *Plews v. Baker*, L. R. 16 Eq. 564; and *Willesford v. Watson*, L. R. 8 Ch. 473.

Mr. Worrell, contra, contends that, as the parties cannot agree, the plaintiff is obliged to come to the Court in order that the partnership outstanding accounts may be got in and the concerns of the copartnership adjusted; and he cites Lindley on Partnership, 5th ed., vol. 2, p. 548; *Thomson v. Anderson*, L. R. 9 Eq. 533; *Taylor v. Neate*, 39 Ch. D. 538.

I have considered all these cases, and that of *Davis v. Amer*, 5 Drew. 64, was where the partners had on their dissolution agreed that two other persons should collect all the debts due to the firm, etc. This was acted upon for sometime, when one of the partners died. A dispute then arose between a debtor and the collectors as to the amount of the account against him; the debtor claiming that only £26 was due, whereas the collectors insisted that it was £30. The surviving partner, upon being applied to by the debtor, agreed that £26 was the amount really due,



Judgment. and requested the collectors to receive that amount in full.  
 Robertson, J. They persisted in refusing, whereupon the debtor after much reluctance on the surviving partner's part, induced the latter to accept the amount; having received this sum he offered it to the collectors, but they would not receive it. The executors of the deceased partner then applied to the Court for the appointment of a receiver; and it was held that they were entitled.

The Vice-Chancellor in giving judgment said: "Surely that is an agreement that instead of either of the partners receiving any of the debts, a third person should receive them all." Suppose in the life-time of Davis, for sufficient reasons, Amer had said, "I don't like this arrangement and will put an end to it," the right of Davis would have been to come to this Court to ask for an account of the partnership transactions and assets, and for the appointment of some person to act as a receiver for the same purposes of convenience as that which had dictated the original arrangement; how does the death of Davis alter his right? His representatives must have the same right. True the death of Davis may have put an end to the authority of Spillman and Spence (the collectors), though in fact I can scarcely doubt that if Spillman and Spence have, since the death of Davis, received any debts, their receipts would be good discharges; but if Davis in his life-time might have a receiver appointed, his death does not prevent his executors having the same right, for I think that Amer has not a right to put an end to the agreement which he has deliberately made and acted upon.  
 \* \* \* For all these reasons \* \* \* I am of opinion I must grant a receiver to get in the outstanding assets," etc.

I do not see how this case helps the defendant's contention. The agreement was there entered into and acted upon, but one of the parties becoming dissatisfied, the Court appointed a receiver at the instance of such party.

In *Law v. Garrett*, 8 Ch. D. 26, the parties had entered into an agreement to refer all disputes to a foreign Court

called the "St. Petersburg Commercial Court," whose <sup>Judgment.</sup> decision should be final. The Court held that the agree- <sup>Robertson, J.</sup> ment to refer, came within the 11th section of the C. L. P. Act, 1854, and that the defendants were entitled to an order on their motion to stay proceedings in the action, and a reference to the "St. Petersburg Commercial Court."

Now the difference between that case and the present is, that the Referee, if I may use this expression, in regard to the "St. Petersburg Commercial Court," was agreed upon between the parties, and it was only compelling the plaintiffs to do or carry out what they had specifically agreed to do. But here the difficulty is that the parties have not agreed on their referee. Nor can they do so. One contends that the referee should be an accountant or a commercial man; while the other contends that he should be one learned in the law, as an important legal question is involved in the differences between them. I therefore do not see how the defendant is assisted in his contention by this case.

In *Plewes v. Baker*, L.R. 16 Eq. 564, the articles of copartnership contained an agreement in case of a dispute, "the same shall be referred to the arbitration of two indifferent persons; one to be named by each of the partners; and in case of a difference in opinion between such arbitrators, then by any third person to be by such two arbitrators named," etc. But there is no such provision here. There, one party could appoint his arbitrator, without the other agreeing to such person's appointment; and the other could appoint his arbitrator; and then a third could be appointed in case of a disagreement, but here the articles say: "The parties hereto shall appoint some fit and proper person," etc. So that if they do not agree on who that "fit and proper person" may be, this agreement falls to the ground. I have not been able to find a case where such an agreement as the one in question has been acted upon by the Court, compelling one of the parties to agree to whoever the other may choose to appoint, for that is really what this agreement means, if it means anything; and

Judgment. the other case of *Willesford v. Watson*, L. R. 8 Ch. 473, **Robertson, J.** affords no assistance to the defendant.

The fact of the matter is simply this, the plaintiff and defendant have disagreed in their partnership matters, and it is now impossible for them to agree to any thing; both have an undisputed right to have the partnership affairs wound up, and either has an undoubted right to apply to this Court to have their matters properly adjusted.

I think, therefore, the plaintiff is entitled to have the partnership accounts taken, the assets realized, and the partnership affairs wound up; and I refer it to Mr. McLean, the Referee, for that purpose; and unless the parties can agree within three days, that one of themselves shall act as receiver, I appoint Mr. Charles Murray as such, neither party apparently having any objection to him.

Further directions and costs reserved.

A. H. F. L.

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## [CHANCERY DIVISION.]

## HAGAR V. O'NEILL ET AL.

*Mortgage—Illegal contract—Immoral consideration—Knowledge of—Participation in—Possession—Foreclosure.*

In a contract for the sale of a house, which at the time of the sale was being used for an immoral purpose, when the character of the house forms no element in the consideration paid for it, mere knowledge on the part of the vendor that the purpose to which the purchaser will probably put it is an immoral one is not sufficient to avoid the contract. There must be a consent to or a participation in such subsequent user, or it must be shewn that the sale was for the purpose of enabling the purchaser to carry out the immoral purpose.

*Semble*, when in an illegal contract for sale a mortgage is taken back to secure the balance of the purchase money, the mortgagee, although the mortgage moneys are not recoverable, is entitled to judgment for possession and foreclosure.

THIS was an action brought by Eliza Hagar against Statement.  
Jennie O'Neill and S. R. Clarke to foreclose a mortgage given for unpaid purchase money, made by the defendant O'Neill to the plaintiff; the defendant Clarke having subsequently purchased the premises from O'Neill subject to the mortgage.

The action was tried at the Toronto Spring Assizes on April 17th and 18th, 1891, before STREET, J., without a jury.

The defence set up was that the consideration for the mortgage was illegal and immoral.

The facts fully appear in the judgment.

*R. G. Smyth*, for the plaintiff.

*John G. Holmes*, for the defendants.

May 11th, 1891. STREET, J. :—

Action upon a mortgage praying payment or possession and foreclosure.

Defence that the consideration was illegal and immoral.



Judgment.

Street, J.

The action was tried before me at the Toronto Spring Assizes in April, 1891, without a jury.

The plaintiff before her sale to the defendant Jennie O'Neill had carried on a house of ill-fame upon the premises in question; then she leased them to the said defendant who carried on the same business for a year and a-half, at the end of which time she purchased the property from the plaintiff for \$5,000, and gave the mortgage in question as part of the consideration. I have no doubt that when the defendant O'Neill purchased she intended to continue to carry on the same unlawful business which she had theretofore carried on upon the premises, and that the plaintiff supposed she would do so; but I am satisfied that the property could readily have been sold for \$5,000 to other persons at the time; that its market value was at least \$5,000, and that the character of the house formed no element in the consideration paid for it.

Within two years after the purchase the defendant O'Neill sold the property to the defendant Clarke for \$6,900, subject to the mortgage in question; and Clarke in the conveyance covenanted with O'Neill that he would pay off and discharge that mortgage; the evidence shews that he paid to O'Neill the difference between the amount of the mortgage and the purchase money; assuming the mortgage instead of paying the balance. He now sets up that he should not be required to pay the amount of the mortgage, because the plaintiff when she sold to O'Neill, must be taken to have known that O'Neill intended to carry on an immoral trade in it, and to have been a party to the intention to carry on that trade.

In order that the defendants should succeed in their defence, they are bound to shew something more than knowledge on the part of the plaintiff of the immoral character of the trade carried on in the house, and a belief on her part that the same trade would probably be continued: they must shew something done by her in furtherance of the immoral purpose, or some consent to or participation in it, or that the sale was for the express purpose

of enabling the purchaser to carry on the immoral business. This rule seems to run through the whole line of cases, both English and American: *Bowry v. Bennet*, 1 Camp. 348; *Pellecat v. Angell*, 2 C. M. & R. 311; *Fisher v. Bridges*, 3 El. & Bl. 642; *Farmer v. Russell*, 1 B. & P. 296; *Cannon v. Bryce*, 3 B. & Ald. 179; *Pearce v. Brooks*, L. R. 1 Ex. 213; *Bagot v. Arnott*, Ir. Rep. 2 Com. Law, 1 (1868); Greenhood on Public Policy, Rule C. p. 94, and cases there cited. *Kelly v. Earl*, 29 C. P. 477; *Smith v. Benton*, 20 O. R. 344.

Judgment.  
Street, J.

In cases of letting, a participation in the immoral use to which the subject matter is put is more easily to be inferred than in cases of sale. Thus, in the leading case of *Pearce v. Brooks*, above referred to, where the brougham was let to a prostitute for a considerable period, and the owner of it knew the character of the woman to whom it was let and allowed her to retain it, it was not difficult for the Court to come to the conclusion that he was in fact a consenting party from the beginning to the use to which she put it, which use they found was an immoral one.

In the cases where the action is to recover the rent of lodgings used by a prostitute for immoral purposes, to the knowledge of the lessor, there is still less difficulty in finding a participation on his part in the objects for which they were used. See *Crisp v. Churchill*, cited in *Lloyd v. Johnson*, 1 B. & P. 340: see also *Smith v. White*, L. R. 1 Eq. 626.

In all these, and similar, cases there was a continual illegal user to the knowledge of the owner of the property, the subject of the contract, during the time that the rent was being earned, and the Court was enabled without difficulty to fix the owner with knowledge of the use to which his property was being put, and therefore of consent to such use.

In *Cannon v. Bryce*, 3 B. & Ald. 179, where the plaintiff sought to recover money lent by him to the defendant, which had been applied by the defendant in settling losses on illegal stock-jobbing transactions to which the lender

Judgment.

Street, J.

was no party, the judgment of the Court was that the plaintiff could not recover; but the judgment is put upon the ground that the money was lent with a full knowledge of the object to which it was to be applied, "and for the express purpose of accomplishing that object."

In the Irish case of *Bagot v. Arnott* above referred to, the plaintiff had advanced money to the defendant knowing that one S. had committed a felony, and that part of the money would be applied by S. in paying his travelling expenses in leaving the country, but the money was advanced, as the jury found, in order to obtain security for another existing debt, and not for the purpose of enabling S. to leave the country. The Court held under these facts that the plaintiff could recover, and distinguished the case of *Pearce v. Brooks*, L. R. 1 Ex. 213.

In the present case the defendant O'Neill has related some alleged conversations with the plaintiff previous to the sale with the object of shewing that the plaintiff encouraged her to buy the property by pointing out the gains which might be expected from a continuance of the trade; but there was no corroboration of her evidence, and I think it would be unsafe to act upon it in derogation of any rights of the plaintiff; parts of it, in which she speaks of a bargain for the "good-will" of the house have the appearance of being an after-thought suggested perhaps by an idea of the effect of such a bargain upon her contract to pay the purchase money.

Leaving this evidence out of the question there is nothing more than knowledge on the plaintiff's part of the use to which the house was being put prior to the sale, and a belief that such use would in all probability be continued; but nothing done in furtherance of that use beyond the mere fact of the sale; no consent to or participation in the subsequent user and nothing to induce the belief that the purpose of the sale had any thing to do with the subsequent use to which the house might be put or was other than that of turning \$5,000 worth of land into that sum in money.

A vendor's right to his purchase money could hardly be held to be gone if he should be told, for instance, before entering into the contract to sell, that the purchaser intended, after purchasing, to dispose of the property by means of a lottery. Might he not, in such a case, lawfully say what the majority of sellers probably would say? "What he does with the property when he has bought it is his business, not mine."

Judgment.

Street, J.

I need hardly point out that the language in which the rule applicable to each case is set forth must in each case be construed in connection with the facts of the particular case in which it is used.

I think, therefore, that the defendants have failed in shewing any taint of immorality in the contract which would enable them to resist payment.

The plaintiff, at the trial, consented that the action should be dismissed as against the defendant O'Neill, not deeming it necessary that a personal order for payment of the mortgage money should be made, and the action is accordingly dismissed as against her, but, under the circumstances, without costs.

Supposing, however, that the original consideration were tainted in such a way as to disentitle the plaintiff to recover judgment for it, the question must then arise whether she is not entitled to a part, at all events, of the relief which she asks, viz., to judgment for the possession of the land.

There can be no doubt that a person who parts with a limited estate only in a parcel of land for a purpose which is immoral or illegal, while he may be unable to compel a reconveyance and may be unable to recover the purchase money, is not punished by any forfeiture of the rights which belong to the portion of the estate which he retains. If he should convey land upon an illegal contract, he can neither recover the land nor the purchase money: if he should let land for an illegal purpose he can not recover rent for it, but, at the expiration of the lease, he can recover possession; and if he sells land upon



Judgment. an illegal consideration, although he may not be able to  
Street, J. sue for the purchase money, yet retaining the legal estate he has the rights which appertain to it. See, as to this *Taylor v. Chester*, L. R. 4 Q. B. 309, and a case of *Wheeler v. Wheeler*, 5 Lans. (N. Y. Sup. Ct., 1872.) 355.

The plaintiff here sold this land upon credit, retaining the legal estate as security for her purchase money. If the consideration was tainted with illegality she cannot recover it by action, but her legal title gives her the right to the possession of the land, and that right must be enforced, under the circumstances, against the defendant Clarke, who has no right there as against her.

If he desires to retain possession or to redeem, he must of course be allowed to do so upon the equitable terms of doing that which he has agreed with the defendant O'Neill to do, namely, paying the plaintiff the balance of the purchase money and her costs; and if he does not do this he should be foreclosed. Whether the consideration here be or be not illegal, this seems to be the proper judgment to be made. The plaintiff is entitled to ask for it if the contract is free from illegality: the defendant Clarke is entitled to it if the contract is illegal, as his remedy against the plaintiff's legal right to possession; and in this view the relief given is not inconsistent with the line of authorities of which *Fisher v. Bridges*, 3 El. & Bl. 642; *Smith v. White*, L. R. 1 Eq. 626, and *Sykes v. Beaden*, 11 Ch. D. 170, are examples, in which the Courts have refused to order payment of moneys due upon an illegal or immoral contract, or the payment of damages for its breach.

In *Willyams v. Bullmore*, 33 L. J. Chy. 461, the Court went a stage further, and decreed the cancellation of a mortgage given to secure an advance of money made by the defendant, the mortgagee, to the plaintiff, the mortgagor, which advance the Court held was made with the object of seducing the plaintiff's daughter. In that case the sole claim of the mortgagee to the property rested upon his illegal contract with the mortgagor; when that contract

was cut away from under him, the mortgagee has no ground upon which to rest his claim. Judgment.

Street, J.

In the present case the plaintiff is seeking to recover possession of that which was undoubtedly hers down to the date of the contract, and only became partially the property of the other party to the contract by means of the transaction which the defendants charge to be immoral.

Upon the ground, therefore, that the contract is not an immoral one upon the authorities, and upon the ground that if it were immoral the plaintiff is entitled to recover possession by reason of the legal estate remaining in her, I think the plaintiff is entitled to a judgment for immediate possession of the land, and to the usual foreclosure clauses, and to add all her costs to her claim. If there are no subsequent incumbrancers, the Registrar will take the account: if a reference is necessary, it will be to the Master-in-Ordinary.

G. A. B.

## [CHANCERY DIVISION.]

## RE WANSLEY AND BROWN.

*Churches — Dispersed congregation—Sale of church property—Trust not ended—Trustees—Sale by—Sanction of County Judge—R. S. O. ch. 237, sec. 14, sub-secs. 1, 2 and 3—Corporate succession—9 Geo. IV. ch. 2, sec. 1.*

In an application under the Vendor and Purchaser Act R. S. O. ch. 112, in which the surviving trustee of a congregation, which had separated and ceased to exist, was making title to land belonging to the said congregation, but useless for its original purpose :—

*Held*, following *Attorney-General v. Jeffrey*, 10 Gr. 273, that the trust had not come to an end :—

*Held*, also that the sanction of the sale and the approval of the deed by the County Judge as provided for by R. S. O. ch. 237, sec. 14, sub-sec. 3, is sufficient in lieu of all that is required by sub-secs. 1 and 2 :—

*Held*, also, that the statute 9 Geo. IV. ch. 2, sec. 1, gave to the trustees “the corporate attribute of succession,” and so created them a corporation, and that under the deed in question they took an estate in fee simple and had power to sell.

## Statement.

THIS was an application under the Vendor and Purchaser Act R. S. O. ch. 112.

The petitioner, Francis Wansley, was the sole surviving trustee of the “Coloured Wesleyan Methodist Church in Canada Chapel and Burying Ground, in the city of Toronto,” who had agreed to sell the property in question to one Charles Brown, who was willing to take it if a proper title could be made.

The original deed to the trustees was taken under the provisions of 9 Geo. IV., ch. 2, and the congregation had dispersed and the property had become useless for its original purpose.

The petition was argued on April 29th, 1891, before FERGUSON, J.

*Walter Read*, for the petitioner. The deed was taken to five trustees under 9 Geo. IV., ch. 2, which gave the right to the trustees to take, but did not give them any power to sell. Different statutes giving powers of sale, such as 12 Vict. ch. 91, sec. 2; C. S. U. C. ch. 69, secs. 8, 9, and 10; and 36 Vict. ch. 135, sec. 9 (O.), were passed at different times, but they were all retroactive, and R. S. O. ch. 237,

now governs the matter. The consent of the congregation **Argument.** required by 36 Vict. ch. 135. sec. 9, cannot be obtained because there is no congregation; but the sanction and approval of the County Judge required by sub-sec. 3 of sec. 14 R. S. O. ch. 237, has been obtained in the regular way after proper advertising, and that is the proper substitute for the assent of the congregation. The words "such assent," in sub-sec. 3, sec. 14 of the statute, means assent obtained as thereinbefore mentioned. Notice was only to be given for the purpose of getting the congregation's assent, and when their assent was dispensed with, there was no necessity for notice. The trustee has a discretion to obtain the assent in either manner. By sec. 13, the trustees may sell. Section 14 merely deals with the conveyance. The congregation's assent only applies to the conveyance. The County Judge's assent applies to the sale as well as the conveyance. When notice cannot be given, it will be dispensed with: Maxwell on the Interpretation of Statutes, 2nd ed., 471. The statute should not be construed to compel the doing of a useless act: Maxwell, 230.

*Lash*, Q. C. C. S. U. C. ch. 69, sec. 10, required both notice to the congregation and the consent of the Court of Chancery. [FERGUSON, J.—But as no consent would be given by the Court without due notice, should you not assume notice when the consent is given, and if County Judge's approval was substituted for the assent of the congregation, that should assume notice too.] The deed to the trustees and their successors gives only a life estate. Are these trustees a corporation: *Humphreys v. Hunter*, 20 C. P. 456; *Trustees of the Ainleyville Congregation etc.*, v. *Grewer*, 23 C. P. 533; *Coleman v. Moore*, 44 U. C. R. 328, at p. 335. The deed declares there should be the full number of five trustees. See also *Doe d. Reed v. Godwin*, 1 Dowl. & Ry. 259; *Warburton v. Sandys*, 14 Sim. 622. If, however, these trustees were a corporation, the surviving trustee keeps it alive: *The Attorney-General v. Jeffrey*, 10 Gr. 273. The congregation has become dispersed and has ceased to exist, so the trust is at an end and the trustee holds for the original grantor.



Argument.

*Read, in reply.* The deed was in pursuance of a statute, the intention of which was to pass the fee: Lewin on Trusts, 8th ed., 85, 213; *Attorney-General v. Columbine*, cited in Boyle on the Law of Charities, 204, 205. As to failure of those to be benefited, see Tyssen's Charitable Bequests, 440. The Court will not permit a reverter if it can be avoided: Tudor's Charitable Trusts, 33.

May 19th, 1891. FERGUSON, J.

This is a petition under the provisions of the Act commonly known as the Vendors and Purchasers' Act. It is presented on behalf of the trustees of the "Coloured Wesleyan Methodist Church in Canada Chapel and Burying Ground, in the city of Toronto," by Francis Wansley, the sole surviving trustee.

Under and by virtue of a conveyance dated the 7th day of July, 1838, the petitioner acquired pursuant to, and as is not now disputed, in accordance with the provisions of the statute of the then province of Upper Canada, passed in the third year of the reign of King George the Fourth, chap. 2, entitled an "Act for the Relief of the Religious Societies therein named," certain lands in the city of Toronto, which are the subject of this petition: a sale thereof having been made to Charles Brown, the respondent, who now objects to the title and declines to complete his contract of purchase. I understand, however, that this purchaser is not what is called an unwilling one, but on the contrary desires to complete the contract if the title is really good, and the estate to be transferred to him is an estate in fee simple.

This deed of the 7th day of July, 1838, recites, amongst other things, that the congregation or society had appointed trustees by the name of the "Trustees of the Coloured Wesleyan Methodist Church in Canada Chapel and Burying Ground, in the city of Toronto." It states that it is made between the then vendors, (naming and describing them) of the one part, and five persons, naming and describ-

ing them in the ordinary way, and adding, "the trustees  
aforesaid," of the other part.

Judgment.

Ferguson, J.

In the operative part of the deed the grant, etc., is unto the parties of the second part "by the name aforesaid of the Trustees of the Coloured Wesleyan Methodist Church in Canada Chapel and Burying Ground in the city of Toronto, and their successors, to be appointed in the manner hereinafter specified." (The statute provided for the appointment of successors in such manner as might be specified in the deed of conveyance.) The habendum is "To have and to hold the said parcel or tract of land, with the building or buildings erected, or to be erected thereon, and all the appurtenances and privileges thereof to them, the said trustees and their successors in the said trust forever, for the site of a chapel and burying ground for the use of the members of the Coloured Wesleyan Methodist Church in Canada, according to the rules and discipline which now are," etc., etc.

This conveyance provides fully for the appointment of successors to the named trustees, and it is not disputed that it contains all that is required to make it a full and complete deed of conveyance under the provisions of the statute. It is not disputed that Francis Wansley is now the sole surviving trustee. A decision of this Court in the year 1884, was referred to, in which it was declared that he and one Jackson were then the surviving trustees, and Jackson has since died. It was conceded that the provision in the conveyance respecting the keeping the number of trustees up to the original number of five, not having been performed or complied with, does not in the circumstances for the purposes of this petition, or for the present purposes, make any difference against the petitioner.

Since the time of this conveyance in 1838, there have been various amendments, repeals, and revisions of the statutes; yet upon a review of the whole it was conceded that the enactments subsequent to that period are retroactive and do not operate any material change affecting the contention here, and that the provisions of the present

Judgment. chapter 237 of the R. S. O., may be looked at and taken as the statutory provisions now governing or affecting the subject.  
Ferguson, J.

The 13th section of this chapter 237, seems to give the trustees for the time being, power to make a sale (they obeying the provisions of the section) when the land held by them for the use of the congregation or religious body becomes unnecessary to be retained for such use, and it is deemed advantageous to sell the land, and it is not disputed, but is admitted that this land is in that position. I need not, I think, further refer to the particular provisions of this section, as it was not contended that any of them had not been complied with that are of any importance here.

The first and second sub-sections of section 14 contain certain restrictions respecting the execution of a conveyance in pursuance of a public or private sale. These have reference mainly to the giving of due notice to the congregation or religious body, and the obtaining of their consent to the conveyance pointing out the manner in which such consent is to be manifested, or may be shown. This consent, or rather assent, seems to be the chief matter aimed at in these sub-sections; what is to be obtained as a result of the giving of the notice referred to, and the thing to be had before any such conveyance is executed.

The 3rd sub-section of the same section 14, provides that instead of such assent of the congregation or religious body, *it shall be sufficient for the validity of any such conveyance* that the sale be sanctioned and the deed approved of by the Judge of the County Court. These have been done by the Judge of the County Court in the present case. It is conceded that he has done all that is required by this sub-section 3, and I am of the opinion that this is sufficient and in lieu of all that is required by sub-sections 1 and 2 of the same section.

It is said that the congregation has separated, and that there is now no congregation, and this is admitted. From this it was contended, though not with great intensity or

earnestness, that the trust had come to an end. But it <sup>Judgment.</sup> appears to me that the case *Attorney-General v. Jeffrey*, <sup>Ferguson, J.</sup> 10 Gr. 273, makes against this view, and I do not give effect to the contention.

The power to sell contained in section 13, seems to me to apply, and to have been followed. The public notice was given as required, and as I have already said, the prerequisites to the making of a conveyance have been fulfilled by a full compliance with the provisions of subsection 3 of section 14, and the chief remaining matter, and, as I think, the really important question presented by this petition, or at all events the most important one is, as to the vendor's estate in the land, the petitioner (the vendor) contending that this was an estate in fee simple, and the respondent (the purchaser) contending that it was a less estate than one in fee.

The Acts passed since 9 Geo. IV., ch. 2, do not, nor does any of them diminish or lessen the estate or interest taken by the conveyance executed under that Act. The powers to sell may well exist under subsequent enactments, but to determine what was the estate or interest taken and held, it is perhaps safer to look at the original Act which was the only Act upon the subject, at the time the conveyance to these trustees was made; although it was stated, and conceded at the bar that it would make no difference if only the Act in the R. S. O. were looked at. It was stated and conceded, and, as I think, rightly so, that assuming the power to sell to be good and well and properly exercised, and all the necessary requirements respecting the conveyance to have been fulfilled and satisfied, the question then is, what is the estate that the vendor had to be sold, and to ascertain this I think, as I have already said, one is to look at the original conveyance and the statute under the authority of which it was made.

This Act provides that whenever any of the religious congregations or societies referred to, shall have occasion to take a conveyance of land for any of the uses aforesaid, (these uses include the present case) it shall and may be



Judgment. lawful for them to appoint trustees, to whom and their successors to be appointed in such manner as shall be specified in the deed, the land requisite for all or any of the purposes aforesaid, may be conveyed ; and such trustees and their successors in perpetual succession, by the name expressed in such deed, shall be capable of taking, holding, and possessing such land, and of commencing and maintaining any action or actions at law or in equity for the protection thereof, and of their rights thereto.

Ferguson, J.

This is contained in the first section of the Act. The second section limits the quantity of land to be taken to five acres. The third section has regard to the registration of the deed. The fourth section has reference to deeds made before the passing of the Act, and these sections constitute the whole Act.

Counsel for the purchaser referred to three cases : *Humphreys v. Hunter*, 20 C. P. 456 ; *Trustees, etc. v. Grewer*, 23 C. P. 533, and *Coleman v. Moore*, 44 U. C. R. 328, at p. 335, in which the position of trustees under Acts subsequent to, but not materially differing, as to the material part, from this one had been discussed, saying that in the present case his fear was that the trustees could not with certainty be considered a corporation, because these authorities seemed to indicate that such trustees had individual interests as trustees.

It is, however, to be observed that in each of these cases the subject of discussion, or at least the important one, was, as to the name or names in which an action respecting the land could be maintained ; and looking at the three cases, it may also be remarked that even this was not definitely settled. It rather appears that the learned Judges, observing the ordinary rule, were not desirous of deciding any thing not necessary for the determination of the questions before them.

In *Humphreys v. Hunter*, at p. 460, Mr. Justice Gwynne however, says that there is not contained in the statute the ordinary clause inserted in Acts of Parliament constituting a body corporate ; but (referring to authorities),

says that a corporation may be established by implication Judgment.  
when the purposes intended cannot be carried into effect Ferguson, J.  
without attributing the corporate character to such body ;  
and further on, that learned Judge says, that in the case  
before him, the only object of a corporate character effected,  
or required to be effected, was, that the estate in the  
land should pass from one set of trustees to another, in  
succession. It is then pointed out that the same purpose  
might have been effected by a certain declaration ; such  
declaration, however, does not exist.

In the case of *The Trustees, etc. v. Grewer*, Chief Justice Hagarty says, at p. 539 : “ I think we may hold in this case that the plaintiffs herein hold this land under the deed from Holliday, as a corporation, or at least in a corporate or collective name, as described in that deed ; and that the statutes recognize their right to act by, and use such name.” In that case an amendment was allowed, striking out the names of the plaintiffs describing themselves as trustees, and allowing them to sue as a corporation, incorporated under C. S. U. C. ch. 69 ; the first section of which, as it appears to me, is in effect for all purposes here essentially the same as the Act 9 Geo. IV., ch. 2, sec. 1, that section being the one which incorporates the body if any does.

It is possible that the discussion in these cases had its reason in the wording of the clause of the Act, which may have been considered not to have distinctly said that the trustees might, by the name expressed in the deed, maintain actions, etc., as I think it does. However this may be, the section of the Act under which the deed here was made, (9 Geo. IV., ch. 2, sec. 1) does distinctly and without any doubt, say that the trustees and their successors in perpetual succession, by the name expressed in the deed, shall be capable of taking, holding, and possessing such land.

This is what appears to me to be important here ; and it is plain to me that it creates or gives what has been called “ *The corporate attribute of succession.*” These

Judgment.  
Ferguson, J. trustees did, by the name expressed in an admittedly proper deed under the Act, take, and have held and possessed these lands; and the statute authorizes the holding of them in perpetual succession by the trustees and their successors by the name expressed in the deed. I am of the opinion, after having looked at a number of authorities beyond those referred to on the argument, that the statute created the trustees a corporation by implication, and that it matters not whether it is called a corporation or a *quasi*-corporation. It was created by law, as I suppose a corporation must be. It was and is for a limited purpose, and I apprehend would be properly called a *quasi*-corporation, and I am also of the opinion that this corporation took an estate in fee if their grantor had so great an estate in the lands.

It was contended that there is also in the present case a trust to sell, and that there is for this reason necessarily the estate in fee. See Lewin on Trusts, 8th ed., 213, and cases there referred to. It is however not at all clear to me that the doctrine applies, and being of the opinion above expressed, I do not stop to consider it further.

I am, for the reasons I have endeavoured to give, of the opinion that the vendors have the estate in fee simple: that they have in the circumstances the power to sell: that they have properly sold, and that all prerequisites for the completion of the transaction by a conveyance have been fulfilled and satisfied.

The judgment or order will therefore be in the vendor's favour declaring that they can make a good title.

The parties agree as to costs, so that no order in this respect is necessary.

G. A. B.

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## [QUEEN'S BENCH DIVISION.]

## ROBINSON V. HARRIS.

*Specific performance—Contract—Exchange of lands—Speculative character of properties—Time—Notice to complete—Reasonable notice—Title not in plaintiff—Election to treat contract as binding—Parties—Matter of conveyance.*

Although, where the property in a contract for the sale or exchange of lands is of a speculative character, the presumption is that time is of the essence of the agreement, such presumption may, as when a time is expressly fixed, be rebutted by the parties treating the contract as still subsisting after the time fixed for its completion.

A day's notice is not a reasonable time within which to put an end to a contract so extended.

To entitle a purchaser to disavow a contract on the ground that the title to the land is not in the vendor, he must repudiate promptly on discovering that fact, and if he subsequently thereto treat the contract as binding he will be held to his election and be remitted to the rights of an ordinary purchaser, including that of terminating unreasonable delay by a sufficient notice.

*Seemle*, an objection that the vendor has not the title in him, where he is in a position to enforce a conveyance of the legal estate to him, is a matter of conveyance and not of title.

THIS was an action by a person asking for specific per-Statement.  
formance of a contract for an exchange of land.

The statement of claim set out the contract, which bore date 1st August, 1888, and was in the form of an offer by the defendant, Mary Harris, to the plaintiff, Francis Robinson, to exchange her property, being lots 52 to 56, Dupont avenue, and lots 64 and 65, Kendale avenue, Toronto, subject to an incumbrance of \$4,375, for houses Nos. 95 and 97 on George street, Toronto, subject to a mortgage for \$4,000, together with a further mortgage to be given by plaintiff to defendant on the lands on Dupont and Kendale avenues for \$1,000, and the sum of \$175 in cash. This offer was in writing, and was accepted in writing by the plaintiff on 3rd August, 1888.

The plaintiff alleged that he was always ready and willing to carry out the contract on his part, but that the defendant refused to carry it out on her part; and claimed specific performance, or, in the alternative, damages for the breach.



Statement.

The defendant by her statement of defence (1) denied making the contract; (2) alleged that she was willing to carry out the proposed exchange at the time the alleged agreement was made, and immediately proceeded to investigate the title to the houses on George street, and made various objections to the title, and several times notified the plaintiff to remove them, and that, in default of his doing so within a reasonable time, she would rescind the alleged agreement; that the plaintiff did not within the time limited explain or remove the objections, and was not able to convey the land to the defendant, etc., and that the defendant thereupon rescinded the alleged agreement, and gave the plaintiff notice, as well in writing as verbally, that the same was rescinded; (3) that the plaintiff had not at the time of making the contract, or of the rescission thereof any title to the lands on George street, or any such title thereto as the defendant was bound to accept, and the plaintiff was unable to perform the contract on his part; (4) that the defendant had a right to have the contract performed by the plaintiff at the proper time, but the plaintiff had been guilty of great delay in the performance of the alleged contract on his part, and contended that she was now released. (5) The defendant claimed the benefit of the Statute of Frauds.

The plaintiff replied (1) that the defendant after the alleged rescission treated the contract as subsisting and continued to negotiate with the plaintiff with reference thereto; (2) that the defendant was herself unable to make title to her lands mentioned in the agreement, and that the delay arose from her inability to do so; (3) that the defendant gave no reasonable notice of her intention to cancel the agreement, and further by reason of her inability to carry out the agreement on her part was not entitled to and did not effectually cancel it.

The action was tried at the Toronto Autumn Assizes on 16th September, 1890, by ARMOUR, C. J., without a jury.

The offer and acceptance were produced and were substantially as set forth in the statement of claim; the offer concluded with the words "all arrears of each party"—referring to the interest in the mortgages to which the respective properties were subject—"to be adjusted to date; matter to be closed in ten days if possible."

The following statement of facts is taken from the judgment of STREET, J.:

At the time of the making of this contract the legal estate in the plaintiff's lands was in one Schrieber, who had entered into an agreement to sell them to one Simpson; and Simpson in his turn had entered into an agreement to sell them to the plaintiff. These facts became known almost immediately after the making of the contract to Mr. Henderson, whom the defendant employed as her solicitor as soon as the contract was made, with instructions to investigate the title on her behalf to the lands she was getting. Mr. Henderson wrote to Mr. Caston a memorandum, the date of which did not appear, but which from the evidence must have been a very few days at latest after the contract was made, in which he said, "Please come over; want to see you in reference to title; all right to Schrieber, with the exception of a lease clause in deed from Sir Campbell to one named Perry *et ux.*, year 1829. Perhaps it can be explained."

The exception here referred to is shewn by the evidence to have been a clause in a conveyance of the property made in 1829 by Sir William Campbell, which appeared to create a charge upon the property.

On 31st October, 1888, after some correspondence, the plaintiff's solicitor, Mr. Caston, wrote the defendant's solicitor as follows: "*Re Harris.* We send you deed of the George street houses subject to our getting in the title, and let this be quite understood, that we have not yet received our title from Mr. Simpson, and, as his agreement is not in form to register, you may register this deed so as to protect the title and subject to the state it was in, and which we are pressing to have made right. Your search will be down to this registration."

## Statement.

The next letter was from the defendant's agent, L. G. Harris, to the plaintiff's solicitor, and is dated 3rd November, 1888: "Please meet me at Henderson's at 9.30 a.m., to-morrow morning, so we can get things fixed in some kind of shape or let it go one thing or the other, as I cannot keep the sharks off any longer." In the evidence given by the writer of this letter he explains that by "sharks" he meant the mortgagees whose interest was coming due.

On 12th November, 1888, L. G. Harris wrote again to Caston proposing that the plaintiff should give a cheque for \$908.50, and suggesting that if that were done the matter might be amicably arranged without further delay. About the same time he wrote again to Mr. Caston: "Please try and find out by the morning about our deal, either pro or con." On the 19th November, 1888, he wrote to Mr. Caston the letter which was relied on as a rescission of the contract, and which was as follows: "Unless something definite is done *re* our exchange (of the day) we will have to call it null and void after to-morrow a.m. They all been here to-day and say they are disgusted, so please, Mr. Caston, come over in the morning first thing, and see what we can do."

Then Harris says that a day or two after writing this letter, he was jumping out of his buggy in front of Caston's office and met him; that he then said to Caston, "You never can get this closed. When is it to be closed?" To which Caston replied that he didn't know; then Harris said, "It is no use waiting;" and Caston replied, "May be we will have to let it go;" or, as he puts the conversation in another part of his evidence, "I said 'what about this thing now?'" he says, 'I have not heard any more.' I said, 'I don't think you can carry this out; I know you can't, and you better let it go;' he said, 'Probably we will have to, and make some money out of something else.'"

On 7th January, 1889, Caston wrote to Harris saying "Re Dupont street. We are waiting to close the matter as soon as you are ready." On 9th January, 1889, Harris

replied that defendant and her son had taken the thing <sup>Statement.</sup> out of his hands altogether, and had left word with Caston's brother that the matter could be considered as cancelled. Caston answered this by a letter to him on 10th January, 1889, insisting that the matter must be carried out. On the next day Messrs. Coatsworth & Co., as solicitors for the plaintiff, wrote L. G. Harris asking that the matter should be carried out. On the 14th January, 1889, they wrote him again asking for an answer to their letter. On the 15th January, 1889, they wrote the defendant threatening proceedings; and on the 22nd January, 1889, this action was begun; statement of claim was not delivered until 18th September, 1889; statement of defence on 5th October, 1889; and reply on 23rd January, 1890; and the action was entered for trial on 6th February, 1890, but was not reached until 16th September, 1890. On the 12th December, 1889, the plaintiff obtained a judgment for specific performance of his contract with Simpson in an action for that purpose, with a reference to the Master as to title, and it was sworn that under that reference the Master had reported that a good title could be made, and that the clause in the conveyance from Sir William Campbell alleged by the defendant to have created a charge upon the land, had not that effect.

Mr. Caston, being called as a witness, denied having assented at any time to the cancellation of the contract.

It was sworn that Schrieber was always willing to convey to Simpson upon being paid his purchase money. The delay in obtaining title from Simpson appears to have arisen from two causes: first, a dispute on his part as to the terms of his contract with the plaintiff; and, second, the settlement of the objection raised by the defendant's solicitor, as between him and Caston, regarding the alleged charge created by Sir William Campbell.

Upon these facts the learned Chief Justice delivered judgment as follows, dismissing the action with costs:—

I think the action must be dismissed. I find this



Judgment. exchange was entirely a matter of speculation, and both parties, each with the knowledge of the other, were dealing with this exchange as speculators. The property was of speculative value, and that being so, I think time is of the essence of the contract, and I think the strict rule should be applied to it.

We have the contract which was made on the 1st of August, 1888. No intimation is given then by Robinson that he was not the owner of the property. He treats the property as if he had the title. It turns out he had not the title; only a contract with Simpson, who had a contract with Schrieber. It is evident Robinson was not prepared to convey the land to the defendant. Finally the defendant got tired of waiting, and being, as I find he was, prepared to carry out his part of the agreement, he insists upon the performance of the contract by the plaintiff. The plaintiff is not prepared to carry it out. Then the defendant gives notice that he refused to carry it out because he cannot wait any longer for the plaintiff.

Now, I think it would be wholly unreasonable to say, because that is the contention of the plaintiff, that this defendant should have to wait till this decree for specific performance was made, because until that time he was not prepared to carry out his agreement at all. I think, therefore, the defendant had a right to put an end to it when he did so. I think at the time the bill was filed the plaintiff was not in a position to carry out his agreement at all.

I think the action must be dismissed with costs.

At the Michaelmas Sittings of the Divisional Court, 1890, the plaintiff moved to enter judgment in his favour, or for a new trial, upon the grounds following:—

(1) That the judgment was against evidence and the weight of evidence.

(2) That the contract was admitted, and, time not being of the essence thereof, it would not be terminable by the defendant without a reasonable notice, which was not given.

- (3) That time was not of the essence of the contract.      Argument.  
(4) That defendant was not in a position to rescind.  
(5) That if an effectual notice was given, it was waived  
and abandoned.

The motion was argued before the Divisional Court (FALCONBRIDGE and STREET, JJ.) on 2nd December, 1890.

*F. E. Hodgins*, for the plaintiff. I contend that the plaintiff should be allowed to make title in the Master's office. The defendant was aware at the outset of the defect, if it be a defect, in the plaintiff's title, that he had not a conveyance of the land he was selling but only an enforceable agreement for a conveyance. This is not a defect going to the root of the matter. The plaintiff was entitled to a reasonable time to carry out his contract. Time was not of the essence of the contract. Both plaintiff and defendant said they were buying for speculative purposes, but the evidence does not shew that each knew that the other was speculating; and so the contract cannot be said to have been of a speculative character to the knowledge of the parties. The clause in the contract as to time being qualified by the words "if possible," time is not of the essence: *Webb v. Hughes*, L. R. 10 Eq. 281; *Patrick v. Milner*, 2 C. P. D. 342; Brett's L. C. in Eq., p. 247. This is a case where time not being of the essence, the defendant is not entitled to repudiate, the plaintiff having an enforceable contract: *Paisley v. Wills*, 19 O. R. 303; *Forrer v. Nash*, 35 Beav. 167; *Wylson v. Dunn*, 34 Ch. D. 569. The one day's notice of repudiation was too sudden and was unreasonable: Fry on Specific Performance, 2nd ed., pp. 471-2. A reasonable time should be given for doing the thing required to be done, and if it is not done the contract may be rescinded: *Crawford v. Toogood*, 13 Ch. D. 153; *McDonald v. Elder*, 1 Gr. 513, at p. 526. Even if the notice had been good, it was waived by negotiations after it was given: Fry, p. 480; *McMurray v. Spicer*, L. R. 5 Eq. 527; *Webb v. Hughes*, L. R. 10 Eq.

Argument.

at p. 286. Something remained to be done on the part of the defendant, for a mortgage was undischarged, and while anything remained to be done the defendant could not give an effectual notice: *Green v. Sevin*, 13 Ch. D. at p. 601; *Crawford v. Toogood*, *ib.* 153; *McDonald v. Murray*, 2 O. R. 573; 11 A. R. 101.

*J. B. Clarke*, Q. C., for the defendant. The state of the title at the date of the contract is important. The defendant was always ready to pay off the mortgage at any time. Even if the notice was defective, Mr. Caston agreed to abandon the contract. There was no privity between the plaintiff and Schrieber, the owner of the legal estate, and the plaintiff had no right to proceed against Schrieber, but only against Simpson, who had purchased from Schrieber, and so could not get in the title and does not come within the cases cited. I refer to Fry, p. 576, secs. 1341-2. I also refer to p. 466, sec. 1049, as to the rule where the property has a commercial character, as here.

*Hodgins*, in reply. As to time, I refer to *Gray v. Reesor*, 16 Gr. 614. Harris's statement that Caston agreed to abandon is denied.

March 6, 1891. The judgment of the Court was delivered by

STREET, J.:—

(After stating the facts set out *ante*.)

The general rule is that in contracts for the sale of land time is not to be considered as being of the essence of the contract; the parties may by express stipulation make it so, or the nature of the property may be such as to induce the Court to consider it so, or it may, after default, be made so by a reasonable notice given by either party to the other. Furthermore, although time be by express stipulation declared to be of the essence of the contract, this stipulation will be treated as waived by the continuation of negotiations recognizing the contract as a sub-

sisting one after the date fixed for its completion ; and the same result is naturally treated as resulting from the continuation of negotiations where time is not made a material element by the express terms of the contract, but where the nature of the property is such as to induce the Court to introduce that stipulation into the contract as one to be necessarily implied. So that, for instance, if two persons, dealing with property of a speculative and fluctuating character, fix a certain day for the completion of the contract, time is presumed to be of the essence of their agreement ; but if the day pass and the contract be still treated as subsisting, the presumption is rebutted and the contract then falls within the general rule and not within the exception.

Judgment.

Street, J.

In the present case the learned Chief Justice has found that the parties were dealing, each to the knowledge of the other, with the properties in question as a matter of mere speculation ; they continued, however, to negotiate for some months after the date for completion fixed by the contract, with the result that time can no longer be considered to have been an essential element in their calculations. It was then competent for either of them to put an end to the delay by notice to the other that the conveyance must be made within a reasonable time, to be named, or the contract would be treated as rescinded. It is asserted by the defendant that such a notice was given by her on 19th November, 1888. That notice was that unless the matter should be carried out on the following morning the contract would be treated as rescinded. It is to be remembered that up to the time this notice was given the contract was undoubtedly a subsisting one. I think the notice was not a reasonable one under the authorities, and that it cannot be treated as having had any effect upon the rights of the plaintiff. The cases upon this point are collected in the 2nd ed. of Dart on Vendors, at pp. 488-9. See especially *Webb v. Hughes*, L. R. 10 Eq. 281 ; *Crawford v. Toogood*, 13 Ch. D. 153 ; *Green v. Sevin*, 13 Ch. D. 589.



Judgment.

Street, J.

The other ground upon which it is argued that the notice, though only a single day's notice, was sufficient, is that which is thus stated in the head-note to *Lee v. Soames*, 59 L. T. 366: "The rule that, where time is not made of the essence of a contract for purchase of land, the purchaser cannot, in the absence of unreasonable delay on the part of the vendor, arbitrarily fix a short day after which he will not be bound: Held, not to apply to a case where at the date of the contract the vendor had not power to sell the estate."

*Forrer v. Nash*, 35 Beav. 167, and *Brewer v. Broadwood*, 22 Ch. D. 105, lay down the general rule which is applied in *Lee v. Soames*, that a vendor who contracts to sell property which belongs to another at the date of the contract cannot insist upon specific performance against the purchaser if the latter declares the contract off upon discovering the absence of title in the vendor. The reason for this is that there is a want of mutuality; it would be unfair to hold the purchaser bound to buy when the vendor could not be compelled to sell. But the general rule is subject to an exception which, I think, takes the present case out of it. A purchaser, when he discovers that his vendor has sold that which he does not own, must make his election promptly between a repudiation of the contract upon that ground, and a ratification of it in the hope that the vendor may be able to acquire a title. After ratifying it by continuing to make requisitions regarding the title, with knowledge of its position, he cannot suddenly shift his position and take the ground that no contract ever existed; by treating the contract as a binding one he has made his election and is remitted to the rights of an ordinary purchaser, including that of terminating unreasonable delay by a sufficient notice: *Murrell v. Goodyear*, 1 D. F. & J. 432; *Wylson v. Dunn*, 34 Ch. D. 569.

In the present case Schrieber, owning the legal estate, contracted in writing to sell to Simpson, and it is stated and not contradicted in the evidence that he was willing at all times to convey upon receiving his purchase money.

Simpson in his turn had contracted to sell to Robinson, Judgment. but after the latter had resold to the defendant, Simpson declined to perform his contract, and an action against him became necessary. The authorities seem to shew that Robinson might have made Schrieber a party to his action against Simpson, had it been necessary to do so, offering to carry out on Simpson's behalf the whole contract between Schrieber and Simpson: *Dyer v. Pulteney*, Barnardiston, (Ch.) 160; *Fenwick v. Bulman*, L. R. 9 Eq. 165; so that he was in a position to enforce a conveyance to himself of the legal estate. The objection here to the plaintiff's title seems, therefore, to have been a question of conveyance only and not one of title: *Sidebotham v. Barrington*, 3 Beav. at p. 528; Dart on Vendor and Purchaser, 2nd ed., 324; and the principle of *Forrer v. Nash and Brewer v. Broadwood* only applies where there is an absence of title in the vendor, and not where the objection is a question of conveyance merely: *Hatten v. Russell*, 38 Ch. D. at p. 334.

But even if the objection here is to be treated as one of title and not merely of conveyance, the defendant, through her solicitor, Mr. Henderson, became aware of it almost immediately after the making of the contract, and it was treated as an ordinary objection—as one, in fact, entitled apparently to less weight than the alleged charge created in 1829; negotiations continued with regard to the title, draft conveyances were exchanged, and requisitions were made, and the contract was treated as being in full force until the notice was given on the 19th November that the conveyance must be made on the following morning or the contract would be treated as at an end.

I think that there was no right upon any ground to give this short notice and that the contract must be treated as subsisting at the time this action was instituted.

The result is, in my opinion, that judgment should be entered for the plaintiff, declaring that the contract ought to be specifically performed and referring the question of title to the Master. Further directions and the question of costs should be reserved.

## [CHANCERY DIVISION.]

## SHORE V. SHORE.

*Power of appointment — Defective appointment — Appointment by will instead of by deed — Will under seal.*

A deed of trust provided that certain lands should go to the settlor's three children in default of appointment by deed. Afterwards he made his will, under seal, whereby he devised "all the rest of my estate, real and personal, to which I shall be entitled at the time of my decease," to one of the three children:—

*Held*, that this residuary devise could not be regarded as an execution of the power of appointment; nor even as such a defective execution as equity would aid, at any rate at the suit of the plaintiff, who, as an illegitimate child of the testator, was only a stranger.

Decision of ROSE, J., affirmed.

**Statement.**

THIS was an action brought by the infant natural daughter of Robert Shore deceased, by her mother and guardian as next friend, against the executors of Robert Shore's will, and the heirs and heiresses-at-law of Robert Shore, for the purpose of having the trusts of the said will declared, and carried out under the direction of the Court, and other subsidiary relief.

Robert Shore died upon December 31st, 1889, and the will in question, which was under seal, was dated September 2nd, 1889, and the sixth clause was as follows: "I give, devise, and bequeath to my son William Robert Shore all the rest and residue of my estate real and personal of which I shall be seized and possessed or to which I shall be entitled at the time of my decease."

By two deeds dated October 13th, 1875, and August 25th, 1876, certain lands were granted and released by Robert Shore to one James Redford, his heirs and assigns to such uses, for such estates, and in such manner as Robert Shore should by deed appoint, and in default of such appointments upon ultimate trust for the three legitimate children of Robert Shore, namely, Thomas Ward Shore, Sarah Ann Mayne, and William Robert Shore, their heirs and assigns as joint tenants.

The said three legitimate children of Robert Shore claimed the lands mentioned in the said two deeds as joint

tenants under the ultimate trust above mentioned, upon Statement.  
the ground that the testator had never executed the power of appointment, while the plaintiff, who was a legatee and devisee of the testator, contended that the sixth clause of the will above set out, operated to pass the said lands to William Robert Shore, and also alleged in her statement of claim that should the other contention prevail the estate of the testator would be insolvent.

The case came up for argument at Stratford, upon September 19th, 1890, before ROSE, J., who dismissed the action with costs.

It appeared that if the 6th clause of the will above set out, did not suffice to carry the lands settled by the deeds of 1875 and 1876, the estate would be insolvent, the property willed to the plaintiff being with the rest absorbed in the payment of debts. The question raised in the case, therefore, was, whether or not the above clause in the will was a sufficient exercise of the powers of appointment in the two deeds, or if defective as such, whether or not the Court would aid the defective appointment in favour of the plaintiff, or in favour of the creditors of the estate.

The plaintiff now moved before the Divisional Court by way of appeal, and the motion was argued December 11th, 1890, before BOYD, C., and MEREDITH, J.

*W. Cassels*, Q. C., for the plaintiff. The plaintiff is an illegitimate daughter of Robert Shore. The question raised at the trial was whether the will of Robert Shore is a proper exercise of a power of appointment by a deed. Rose, J., at the trial referred to *Smith v. Ashton*, 1 Ch. Ca. 263. The will being under seal, and the settlor being the beneficial owner of the property, and provisions as to appointment by deed being purely for his benefit, I submit it is undoubtedly a good appointment. If it were not, a Court of Equity will hold it so, for the benefit of creditors. With the exception of one late case, the authorities seem in favour of validity: *Sneed v. Sneed*, 1 Ambler 64; *White*



Argument. & Tudor L. Cas. 6th ed., vol. 1, p. 270; *Roscommon v. Fowke*, 6 B. P. C. 158; *Edwards v. Edwards*, 3 Madd. 197. *Bushell v. Bushell*, 1 Sch. & L. 90, went off on the point of appointment being joint as required. *Bruce v. Bruce*, 11 Eq. 371, turned on a question of whether there was an intention to appoint. The recent case above alluded to is *re Phillips*, 41 Ch. D. 417, where certainly Chitty, J., uses very strong language, that an appointment by deed was not well executed by will. But it was *obiter dictum*. In *Smith v. Ashton*, 1 Ch. Cas. 263, the wording was different. The plaintiff can say that the property specifically devised to her should not be applied in payment of debts until the appointed property is exhausted: Notes to *Tollet v. Tollet*, W. & T. 6th ed., vol. 1, pp. 272, 277. She is in a stronger position than if she were a creditor.

*Idington, Q. C.*, for Sarah Anne Mayne and Thomas Ward Shore. We have never admitted the insolvency of the estate. As to what is a good appointment, it is clear that an appointment which is to be made by deed cannot be made by will: Sugden on Powers, 8th ed., p. 209; Farwell on Powers, p. 142. This was the rule at common law. Then equity says if there is a defective exercise of any power, and it really appears from the instrument that the man intended to execute the power, the Court will bring its power to bear, and operate on the conscience of the heirs: Sugden, *ib.*, p. 535. But defective execution will not be aided in favour of an illegitimate child: *Tudor v. Anson*, 2 Ves. sr. 582. Besides, the particular will in any event could not be aided. There is no intention on its face to execute the power: *Garth v. Townsend*, L. R. 7 Eq. 220; *In re Dyke's Estate*, *ib.*, 337; *Cooper v. Martin*, L. R. 3 Ch. 47; *Chapman v. Gibson*, 3 B. C. C. 229; *Morse v. Martin*, 34 Beav. 500; Farwell on Powers, pp. 259, 267. As to the presence of a seal, the only case that would approach such a view as that this made the appointment valid, has been cited, *Edwards v. Edwards*, 3 Madd. 197. It turned on the words used, and the Court did not look on the words "instrument signed,

sealed, and delivered" as necessarily meaning a deed, Argument.  
 anxious as it was to support the appointment. The publication of the will was held to be equivalent to a delivery, but that did not make it a deed. As to the property being virtually his own, if the child was legitimate this argument might be used. *Phillips v. Cayley*, 43 Ch. D. 222, 231, shews that the Wills Act does not help the plaintiff. *In re Esther Williams Foulkes v. Williams*, 42 Ch. D. 93, may also be cited.

*E. Sidney Smith*, Q. C., for the executors.

*Cassels*, Q. C., in reply. The deficiency of assets was admitted at the trial. When cases are traced down no case holds an execution by will under seal is a defective execution of a power by deed. In *Bruce v. Bruce*, L. R. 11 Eq. 371, the exact point was raised, and Romilly, M. R., says there was no doubt that power to execute by deed may be well executed by will. Of course, I admit, that if there is a power simply to appoint by will, an appointment by deed is not good. This is not a case of the plaintiff coming and asking to have a defective execution of the power aided for her benefit. But, she says, there being creditors and he having appointed, as he has, for the payment of the debts, I am entitled to an administration on that basis.

January 19th, 1891. BOYD, C.:—

By the trust deed executed by the testator the land in dispute will go to his three children William, Thomas, and Sarah in default of appointment by deed. By will under seal the testator devised as residue "all the rest of his estate, real and personal, to which he shall be entitled at the time of his decease" to his son William, and it is contended that the residuary devise should be regarded as an execution of the power of appointment. But at best it would be but a defective execution; and *this*, equity will not aid, except for the benefit of children; but it would be

Judgment.

Boyd, C.

no benefit in this sense to take away from the three in order to give to one; *Tollet v. Tollet*, 2 P. Wms. 489.

It is said if equity aids the execution of the power the land in question will pass under the will and so be available for creditors' claims in aid or in exoneration of the land specifically devised to the plaintiff, and if the execution of the power is not thus aided, the estate devolving upon the executors will prove insolvent, and hence that equity should aid for the benefit of creditors. That is a matter, however, for the creditors to raise, if, as a fact they cannot be otherwise satisfied. The plaintiff as a natural child is a stranger, has no direct equity to seek assistance against the insufficiency of the execution of the power, and if the Court does not act directly for her benefit neither should the Court act indirectly. Affirm judgment.

MEREDITH, J.:—

The power of appointment is "by deed."

The instrument in question is a will: essentially, and nothing, but a will.

There is no significance in the seal; in this province, at all events, where the sealing as well as signing of wills, is a practice so common.

The Act respecting the Law and Transfer of Property, R. S. O. 1887, ch. 100, does not help the plaintiff; the appointment, if any, being testamentary, and not by deed; nor does the Wills Act, there being no power to appoint by will.

But the Courts will in a proper case aid, as a defective appointment, an appointment made by will instead of by deed: *Tollet v. Tollet*, 2 P. Wms. 489; *Bruce v. Bruce*, 11 Eq. 371.

Then the question is whether or not this is a proper case. Although the case has been presented in a very unsatisfactory way, without any evidence except such as can be extracted from the deeds and papers filed and the plead-

ings, I think that, looking at the purpose for which the deeds were made, and the testator's dealings with the lands subsequent to the making of them, and as without them there would be at the least a great deficiency of assets, nothing for the residuary devisee or legatee or the plaintiff the estate it was said would be insolvent, sufficient appears to shew an intention on his part to dispose of the whole property, that comprised in the deeds as well as any other he possessed, by the will : *Smith v. McLellan*, 11 O. R. 191 ; *Garth v. Townsend*, L. R. 7 Eq. 220. But I am of opinion that aid cannot be given in this case because the effect of it would be to deprive the legitimate children of their rights, under the deeds, to give some claimed indirect benefit to an illegitimate child : nor can the plaintiff invoke the rights of creditors, and the less so as those rights are sought to be enforced, not to save or benefit creditors, but only to have them paid out of the property of the legitimate children, which they take under the deeds in default of appointment, instead of out of the property devised to the plaintiff by the will in case of a deficiency of assets.

The claim in respect of the property comprised in the deeds was properly dismissed, but that under the will in question should have been saved. The judgment should be amended by dismissing the action with costs, but without prejudice to any other action or proceeding to enforce that portion of the claim made under the will, that is, to have the benefit of the provisions of the will if the testator left sufficient property for that purpose.

A. H. F. L.

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Judgment.  
Meredith, J.



TRUSTEES OF ROMAN CATHOLIC SEPARATE SCHOOL, SECTION NO. 10 OF THE TOWNSHIP OF ARTHUR V. THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF ARTHUR.

*Public schools—Roman Catholic Separate Schools—Incorporation of—Prerogative rights—Matter of form—Matter of substance—Additional accommodation—Right to form new separate schools—49 Vict. ch. 46, (O.) secs. 22, 24, 68—R. S. O., ch. 225, sec. 67—Ib. ch. 227, sec. 28, sub-sec. 11.*

Six persons, Roman Catholics, some of whom were supporters of an existing Roman Catholic Separate School, No. 6, and others, Public School supporters in several adjoining Public School sections, convened a meeting for the purpose of establishing a Roman Catholic Separate School, which they thereupon assumed to do; but only three of them were residents of the same school section, and also heads of families:—

*Held*, that the requirements of 49 Vict. ch. 46, (O.), secs. 22, 24, were not complied with, and consequently there was no valid incorporation of the trustees elected at such meeting.

*Per* BOYD, C.—The creation of corporations is a prerogative act, and where the power to make them is, as in this case, delegated to private persons, the method prescribed by the legislature should be substantially followed. In such case form is of the substance, and blunder in form means invalidity.

*Held*, also, that a question as to the valid incorporation of trustees of a Roman Catholic Separate School does not come within the purview of 49 Vict. ch. 46, sec. 68, (O.), R. S. O. 1887, ch. 225, sec. 67, which presupposes incorporation.

Decision of FERGUSON, J., affirmed.

*Held*, also, *per* FERGUSON, J., that the words “or other municipal authorities” in this section, do not embrace the municipality itself.

*Held*, also, *per* MEREDITH, J., that the incorporation must be by Roman Catholics within an existing Public School section, with the same boundaries and number as such Public School section, and, therefore, apart from the informality of the proceedings, there could be no valid incorporation here: that the relief of the dissatisfied supporters of Roman Catholic Separate School No. 6—if they were entitled to any—was in additional school accommodation under R. S. O. 1887, cap. 227, sec. 28, sub-sec. 11, and not as here sought: that no provision is made for the withdrawal of a Roman Catholic Separate School supporter from one section to support another: and that the plaintiffs’ remedy, if duly incorporated, was not in an action to recover rates collected by the defendants for others, but in proceedings to compel the collection of their rates.

Statement.

THIS was an action brought to recover the amount of certain school rates which the plaintiffs alleged that the defendants had received as trustees for them, under circumstances which are fully set out in the judgments.

The action came on for trial at Guelph, before FERGUSON, J., on May 19th and 20th, 1890, and was continued on June 7th, 1890, at Toronto.

*Guthrie, Q. C., and Hoyles, Q. C., for the plaintiffs.*

Argument.

*Shepley, Q. C., and Kingston, Q. C., for the defendants.*

September 4th, 1890. FERGUSON, J.:—

The plaintiffs allege that they are a corporation incorporated under the provisions of "The Separate School Act," and that the defendants are the municipal corporation of the township of Arthur, in which township the plaintiffs' school is situated, and the supporters thereof reside : that they, the plaintiffs, were so incorporated in the year 1887, and in that year proceeded to erect their school house ; and that in the summer of the same year they had their school in operation : that for their lawful purposes they required in the said year the sum of \$240, from the supporters of their school, and they duly requested the defendants before the meeting of the council in the month of August in that year, to cause through their collectors and other municipal officers, to be levied upon the taxable property liable to pay the same, the said sum of \$240 for rates and taxes payable by the supporters of the said separate school : that the defendants thereupon professed to raise doubts as to whether or not the plaintiffs had been duly incorporated. They then state somewhat historically and at considerable length, conduct on their part and on the part of the defendants, embracing certain references to the Minister of Education and the answers from his department, including what they contend was a final determination of the differences ; which determination they say was in favour of their contention, and they say that after this determination was made known to the defendants, and after the defendants' council had ratified and accepted the same, and relying upon the representation of the defendants that they in good faith intended to and would carry out what was indicated by the decision of the Minister of Education, they, the plaintiffs, instructed the supporters of their school to pay the school rates to the defendants, and that under the belief that the defen-

Judgment. dants would pay the same over to the plaintiffs, these supporters did accordingly pay their school rates to the amount of \$236.72 to the defendants; that the defendants so received these moneys for the purpose of paying the same over to the plaintiffs, but although duly requested so to do, have refused and still refuse so to pay the same, and that they, the plaintiffs, have not received the money or any part thereof. Some reference is then made to the form of the assessment roll for that year, and the names of the persons who it is alleged paid these moneys to the defendants, being thereon designated as supporters of the plaintiffs' separate school. The plaintiffs then, amongst many other less important things, say that the defendants received these moneys as trustees thereof for the plaintiffs, and ask an account and an order for payment. It was agreed or rather not disputed that if the plaintiffs are held entitled to recover, this sum of \$236.72 is the proper amount.

The defendants specifically deny that the plaintiffs were incorporated as stated by them. They also deny the request alleged to have been made to the council before their August meeting in 1887, to cause the \$210 or any sum to be collected by their officers. They say they did not by their officers or otherwise collect any moneys from the ratepayers referred to in the plaintiffs' statement of claim for the plaintiffs, or to which the plaintiffs are or were entitled, and they deny any indebtedness whatever to the plaintiffs on account of the matters to which the plaintiffs refer in their claim. The defendants then state many things, and at much length, in reference to the matters in difficulty, and what was done by each party in relation thereto, including the action taken by the Minister of Education, and as to this they say: That there was no question in dispute between the plaintiffs and the defendants within the meaning of section 68 of the Separate School Act, 49 Vict. ch. 46, (O.): that the Minister had not power to create a corporation or decide that a corporation within the meaning of the Act, had been created: that the Minister's decision is not conclusive on the parties, and did not oust

the jurisdiction of the Court: that the Minister having <sup>Judgment.</sup> once decided the matter—as they say in a former part of <sup>Ferguson, J.</sup> their pleading as early as August, 1887, and before the August meeting of the council for that year—and the parties concerned having acquiesced, the Minister was *functus officio* at and before the time of the decision relied on by the plaintiffs: that the Minister gave no opportunity to the defendants—if they were concerned therein to give evidence, or present their case—but decided *ex parte*: that no evidence on oath was taken, but the matter was decided on interviews and correspondence, with persons in the plaintiffs' interest: that the Minister assumed after the time appointed by statute therefor to rectify and confirm the plaintiffs' irregular proceedings to effect their incorporation, and that he assumed to decide upon questions not submitted to him, and that the decision was induced by certain incorrect and fraudulent statements made to him on behalf of the plaintiffs. The defendants also add that the powers of the Minister under section 68, do not extend to the questions assumed to be disposed of by him. The issue is taken by the plaintiffs.

Sections 22, 23, and 24 of the Act of 1886, 49 Vict. ch. 46, (O.), provide for and state the manner of incorporation of trustees of Roman Catholic Separate Schools. It was conceded that this is the Act and these the provisions applicable to the present case.

Section 22 says: Any number of persons, not less than five, being heads of families and householders or freeholders resident within any school section of any township, incorporated village or town, or within any ward of any city or town, and being Roman Catholics, may convene a public meeting of persons desiring to establish a separate school for Roman Catholics in such school section or ward for the election of trustees for the management of the same.

Section 23 says: A majority of the persons present being householders or freeholders and Roman Catholics, and not candidates for election as trustees, may, at such meeting, elect three persons resident within such section,



Judgment. or an adjoining section, to act as trustees for the management of such separate school.  
Ferguson, J.

Section 24 says: Notice, in writing, that such meeting has been held, and of such election of trustees, shall be delivered by one of the trustees so elected to the Reeve or head of the municipality \* \* in which such school is about to be established, designating the names, occupations, and residences of the persons elected in the manner aforesaid as trustees for the management thereof; and it shall be the duty of the officer receiving the same to endorse thereon the date of the receipt thereof, and to deliver a copy of the same, so endorsed and duly certified by him, to such trustee; and from the day of the delivery and receipt of every such notice or \* \* the trustees therein named shall be a body corporate under the name of \* \*

In the present case the meeting for the election of the trustees to be incorporated took place on the 3rd day of January, 1887. The notice by which this meeting was convened bore date the 27th day of December, 1886. It appears to have been signed by six persons. Of these persons two were residents of school section No. 9 and one was not the head of a family, but resided in the house of his brother. It was not disputed that each of the other three was a person such as is described in section 22 of the Act. Nor, on the other hand, was it disputed that these six persons were the persons who "convened" the meeting. Nor was it contended or asserted that the meeting was convened by any other persons, or by any other means whatever. On the evidence it was quite plain that the meeting was convened by these six persons, and just as plain that three of them were persons not falling under the description of persons found in section 22 of the Act, which requires that the five persons (at least) shall be residents within the same school section and possess the other qualifications mentioned. This case required, I think, to convene the meeting, at least five persons resident in school section No. 10 having the other qualifications mentioned. There were not five such persons conveners of the meeting.

Nor were there five persons resident in any one school section, for two, and two only, of the six, were resident in school section No. 9. Judgment.  
Ferguson, J.

Apart from the provisions of the Act there is I think no authority for convening or holding such a meeting. This meeting was not convened according to the requirements of the Act which are positive and unequivocal, using the words: "not less than five," and the words, "resident within any school section of any township," and I see no course but to hold that it was an unauthorized meeting, and that proceedings thereat were void or not effectual for the purposes intended.

Section 23 uses the words: "may at such meeting elect." The plain meaning of this is a meeting convened as provided for by section 22.

Section 24 uses the words: "such meeting," "of such election of trustees," "the trustees so elected," and the words "the persons elected in the manner aforesaid." I am unable to perceive how any of these expressions can properly apply to persons elected or appointed at this meeting of January 3rd, 1887.

The incorporation of a body of trustees is in itself an important matter. The statute provides a very simple and inexpensive means of effecting it, a means well suited or adapted, so far as I am able to perceive, to the accomplishment of the end. The attempted employment of these means should not I think be condemned on either trifling or what are perhaps too often called technical grounds or reasons. There was not, however, in my opinion in the present case, what can at all be called a substantial compliance with or performance of positive requirements to effectuate such an incorporation as is claimed by the plaintiffs, and I think I am bound to find and decide in favour of the defendants upon their pleading that the plaintiffs were not incorporated at the time in question. I think the objection to the incorporation goes to the very root of the matter. One's inclination would, I may say, naturally be to arrive at the opposite conclusion if a rea-

Judgment.  
Ferguson, J. sonably clear way of doing so could be presented or ascertained, but I can find no such way, and therefore decide this question as I have said above. I do not see that *Wallace v. Township of Lobo*, 11 O. R. 648 is an authority for saying the defendants on this subject are estopped as was contended. I do not think they are so estopped.

Another question was raised as to the position of those who were or had been supporters of Separate School No. 6. The provisions as to persons in their position is contained in section 48 of the Act 49 Vict. ch. 46 (O.), which are: "Any Roman Catholic who may desire to withdraw his support from a Separate School shall give notice in writing to the clerk of the municipality, before the second Wednesday in January in any year, otherwise he shall be deemed a supporter of such school." There was much evidence offered, and much contention as to whether or not this notice had been given by or on behalf of those supporters of Separate School No. 6. At the trial I made some remarks, and offered an opinion upon this evidence. I think it very plain indeed that such notice was not given as required by the provisions of the section, and I find and decide accordingly. The effect then would be that those supporters of Separate School No. 6 remained for and during the year in question supporters of that school.

In this case it is to be remarked that the moneys in question were levied, collected, and paid over in accordance with the provisions of a by-law of the defendants. This by-law appears to have been read the first time on the 4th day of August, 1887, and the third time on the 3rd October, 1887. It was not until about December 22nd, that the decision, or what has been called the final decision of the Minister of Education was obtained. This favoured the contention of the defendants and was professedly under the authority of section 68 of the Act.

It was contended that there had been a former decision of the minister which was in favour of the defendants' contention. I do not know that from what appears this can

fairly be said. There was, however, correspondence on the subject with the office of the Minister, (the department) <sup>Judgment.</sup> Ferguson, J. which up to the time of the final passing of the by-law favoured the course adopted by the defendants, and according to the evidence given by the Minister himself, as I understand it, these communications from the department were by the course of business authorized communications. The by-law so far as I can perceive was passed and carried into effect in good faith and so far as one can readily see was in accordance with the only course then open to the defendants. They had been advised by their solicitor that the plaintiffs had not been properly incorporated, and what under such circumstances and with the communications they had from the department, what were they to do at the time of passing the by-law but what they did do?

The contention that the defendants are liable because the ratepayers, said to be the plaintiffs' ratepayers, would not have paid their taxes but upon the understanding that the money was to be paid over to the plaintiffs, must I think, fall to the ground. If they had resisted payment the collector would simply have collected the taxes.

So also, must, I think, the contention having for its foundation two certain informal resolutions of the council the one rescinding or nullifying the other. Each of these was made, as I understand the evidence, at an informal meeting of a sufficient number of the members of the council. I do not think I need dwell upon this subject further than to say that I fail to perceive how what was done had the effect of rendering the defendants liable in respect of the moneys claimed by the plaintiffs.

There were other contentions which appeared to me to be of a minor character to which I think I need not further allude.

There is, however, the contention based upon what is called the final decision of the Minister. This bears date the 22nd day of December, 1887, and purports to be made as an equitable arbitrament under the provisions of section 68 of the Act, 49 Vict. ch. 46, (O). I cannot avoid being of



Judgment. the opinion that if the department had been as fully and  
Ferguson, J. accurately informed on the subject as the evidence has  
informed me the conclusion would not have been the  
same, but this is not the question here.

The provisions so far as they can have application here are: "In the event of any disagreement between trustees of Roman Catholic Separate Schools and inspectors of public schools, or other municipal authorities \* \* the case in dispute shall be referred to the equitable arbitration of the Minister of Education, subject nevertheless to appeal to the Lieutenant-Governor in Council whose award shall be final in all cases."

With great respect, I am of the opinion that the case does not fall under this provision. The kind of disagreement mentioned in the section is one between trustees of Roman Catholic Separate Schools and the other or others referred to. This pre-supposes the incorporation and existence of such trustees. The question or issue raised by the pleading of the defendants in denial of the proper incorporation of the plaintiffs reaches the very existence of the plaintiffs, one of the parties to such supposed disagreement, and I am unable to see that such a question is embraced in the provision or how it could be decided as contended for by the plaintiffs if there were no other reason than this. Nor can I see that the department by a ruling or decision under the provisions of this section can call into existence a corporate body that according to law had before the ruling or decision no existence.

I am also of the opinion that the words, "or other municipal authorities," in this section could not have been intended to embrace the municipality itself so as to enable the Minister to decree that the municipality shall pass by-laws, repeal by-laws, etc., etc.

Some of the ratepayers feeling interested procured the assessor to make upon the roll certain marks to indicate that the assessment of each of these was as supporters of Roman Catholic Separate School No. 10. It was mentioned, but not strongly urged, that this roll was binding

upon all persons interested. It is enough, I think, to say that the assessor had no authority to do this. There was no by-law authorizing anything of the sort, and if I am right in my view as to the incorporation, or supposed incorporation of the plaintiffs, there was no jurisdiction to pass a by-law authorizing what the assessor did as above stated, and these marks made by the assessor on the roll were and are, I think, simply void as being without authority and without jurisdiction to grant authority if that had been attempted by the council, and are not binding or conclusive.

Judgment.  
Ferguson, J.

The other matters that were made subjects of contention I think I need not discuss.

I am of the opinion that for the reasons that I have endeavoured to give, the plaintiffs' case wholly fails, and that the action should be dismissed. If the decision were that the plaintiffs are not now an incorporated body, I should perhaps be unable to award costs against them. This is not the case. I only decide that at the time of the occurrences giving rise to this litigation, the year 1887 they were not an incorporated body. I understand that they have since become properly incorporated, and as such incorporated body they bring this action. Under such circumstances I may award costs against them, and I think the dismissal of the action should be with costs, to be paid to the defendants by the plaintiffs.

The plaintiffs now moved before the Divisional Court by way of appeal from the above decision, and the case came up for argument on December 12th, 1890, before BOYD, C., and MEREDITH, J.

*Hoyles, Q. C., and Guthrie, Q. C.,* for the plaintiffs. Only the Crown can investigate whether corporate powers have been gained: *Waterman on Corporations*, vol. 1, p. 143, n. 2. Besides, the defendants are estopped from questioning the plaintiffs' incorporation. They applied to the council for a loan to help the plaintiffs to put up a building. Again, in

Argument.

July, 1887, the plaintiffs were requested to send in estimates for their expenses for that year, and they did so. This was another recognition by the defendants of their corporate existence : *School Section No. 24 v. Corporation of Burford*, 18 O. R. 546. The tax was levied on this estimate. On the faith of this recognition then received the plaintiffs went on and put up a school-house, and a teacher was engaged. The ratepayers paid on the faith of the school being recognized. If any notice of withdrawal from Separate School No. 6 was needed it was sufficiently given by what occurred. There was a *de facto* corporation of separate school trustees, and why should not the question of incorporation be solved equitably : *Wallace v. Township of Lobo*, 11 O. R. 648 ; *Maxwell on Statutes*, 2nd ed., p. 154 ; *Allen v. Sharp*, 2 Exch. 160. We refer especially to R. S. O. 1887, ch. 227, secs. 21, 22, 23, 47, 55, 67 ; R. S. O. 1887, ch. 225, sec. 120 ; and also to *Morawetz on Private Corporations*, 2nd ed., sec. 735.

*Kingston*, Q. C., for the defendants. The new Separate School is within two miles of No. 6, and this is not intended by the legislature. This attempt to incorporate was in derogation of common law : *Hamilton and Flamborough Road Co. v. Townsend*, 13 A. R. 534. Notice must be given in order to get out of one into another school section : R. S. O. 1887, ch. 227, secs. 17, 40, 47, 49, 53, and 54. No sufficient notice was given. The defendants objected to the Minister's jurisdiction, and never attorned to it. We refer also to R. S. O. 1887, ch. 224, secs. 4, 5, and 6 ; *Maxwell on Statutes*, 2nd ed., pp. 68, 158, 405.

January 19th, 1891. BOYD, C. :—

It is sound doctrine to hold that in the acquisition of corporate powers the method prescribed by the legislature should be substantially and even strictly followed. That for two reasons in the present case : the creation of corporations is a prerogative act, and when the power to make is delegated to private persons to be exercised in a certain way, any

deviation therefrom is not an exercise of the power delegated ; in such a case the form is of the substance and blunder in form means invalidity. And, again, the normal condition of school affairs is, that primary education should be given in public schools common to all, subject to certain governmental regulations as to religious instruction ; but here the ratepayers moving seek to depart from the established form and erect a Separate Roman Catholic school. It is right, therefore, to say that reasonable strictness must be observed in the initiatory proceedings. It appears to me from the words of the law to be essential that a public meeting should be convened by not less than five heads of families duly qualified by residence and religion as provided in section 21 of the Separate Schools Act, R. S. O., 1887, ch. 227, in order to the valid election of trustees. The Act is silent as to how the meeting is to be convened, *i.e.*, by what sort of notice or by what manner of publication ; and as to such details, some reasonable latitude is permissible, but there must be a group of five qualified residents within the particular school section, who shall unite in convening the public meeting at which action is to be taken in establishing a Separate School in that section. The proceedings here were initiated by a group of less than five so qualified, and that appears to be a fatal fundamental error which vitiates all proceedings based on the assumption that a valid corporation of Separate School trustees had been called into existence. Nothing in the Act provides a cure for this radical defect.

Judgment.

Boyd, C.

The broad principle on which I proceed is thus expressed by Lord Cottenham, in *Forrest v. Harvey*, 4 Bell. Sc. App. at p. 213. "It is a principle of the law of this country, and equally so of the law of Scotland, that where a special authority or jurisdiction is given by Act of Parliament, the provisions of the Act shall be strictly performed. The jurisdiction is given with all the accompaniments which the legislature thought proper to engraft upon the enactments, and these provisions are not permitted to be



Judgment. departed from. The one part as well as the other is  
Boyd, C. essential to the jurisdiction given."

I cannot read section 67 of R. S. O., 1887, ch. 227, as extending to a disagreement which involves the original status of the trustees as a corporate body, upon an objection raised by the municipality wherein the alleged Separate School corporation seeks to exercise taxing and other governmental powers. That section which is *in pari materiâ* with section 6 of ch. 224, applies to matters of internal economy, and regulation 9, wherein the legal status of the trustees as a corporation, is assumed, and I agree with the judgment in appeal, that it is not as framed of sufficient scope and compass to embrace the contention now in litigation.

For these main reasons, I concur with the decision, and think it should be affirmed with costs.

MEREDITH, J. :—

I agree with the trial Judge in the conclusions reached by him, and would dismiss this motion with costs.

I am unable to find any warrant, in the Act in question, for the plaintiffs' incorporation, even if their proceedings had been, in form, in accordance with its provisions.

What was sought was, practically, a separation, from Roman Catholic school section No. 6, of a number of its ratepayers—because of their dissatisfaction arising from the situation of the school—and the formation of another Roman Catholic Separate School corporation, and the erection of a new school-house, with and by supporters to be obtained from their own school section, and from Public School Sections Nos. 3, 9 and 10, in the same township.

The resolution of their meeting was in these words:

"That a Separate School be formed on the 2nd and 3rd concessions line, and that the school be built on lot 12 concession 3."

The secretary of that meeting, in his testimony, puts it in this way:

“Q. With the exception of the people who lived on the boundary, they were people who were trying to break off from Separate School 6 ; is not that so ? A. Yes. Judgment.  
Meredith, J.

“Q. All except two ? A. Yes.

“Q. Who were they ? A. Francis and Andrew Obercht.

“Q. All at the meeting except Francis and Andrew Obercht belonged to Separate School Section No. 6 ? A. Yes.

“Q. So that this meeting was composed of soreheads from Separate School 6 ; there had been a row up there ? A. Not that I know of. I suppose they thought they were too far from the school ; had to walk too far, like myself.

“Q. All the three men—Hayes, Cantlin, and Lehman—who were elected trustees, all lived out of No. 10 ? A. Yes,

“Q. They were all supporters of No. 6 before ? A. Yes.”

It seems to me that the seceders' relief, if they were entitled to any, was in additional school accommodation within their own school section, under sub-section 11 of section 28 of the Act ; and that they had no power, alone, or with supporters from other school sections, to form another corporate body under the Act, either within section 6 or in any other school section, or partly in one and partly in another, or others.

The intention seems to have been to comprise in the new section parts of public school sections Nos. 3, 9 and 10, as well as of No. 6. The witness O'Donnell in his testimony says that “The separate section takes in parts of No. 3, and parts of 10, and parts of 9.”

The burden of establishing clearly their right to separate, and to incorporation under the Act, is upon the plaintiffs.

“The Legislature intended that the provisions creating the common school system, and for working and carrying that out, were to be the rule, and that all the provisions for the Separate Schools were only exceptions to the rule and carved out of it for the convenience of such separatists as availed themselves of the provisions in it in their favour,” per Burns, J., *Re Ridsdale and Brush*, 22 U. C. R. at p. 124 ; and “it lies on the plaintiff claiming exemption as a separatist, to avow and prove all those exceptional

Judgment. matters, taking him out of the general rule :” per Gwynne, J., *Harling v. Mayville*, 21 C. P. at p. 11. See *Farr v. Meredith, J.* *McHugh*, 24 C. P. 13, 21.

As early as 1846, municipal councils were required to divide all townships into school sections—9 Vict. ch. 20, sec. 9, (C.), and that provision has ever since been continued in force and is now comprised in section 9 of “The Public Schools Act,” R. S. O. 1887, ch. 225.

So that we start with the territorial division of every township into public school sections.

Then section 21 of the Act in question, “The Separate Schools Act,” under which, and the following two sections, the plaintiffs claim to be incorporated, provides that “Any \* \* *resident within any school section of any township*” may initiate the proceedings, by convening “a public meeting of persons desiring to establish a separate school for Roman Catholics *in such school section* \* \* ” and under section 23 the trustees are to be a body corporate, under the name of “The trustees of the Roman Catholic Separate School *for section No. in the township of* .”

Then by sec. 40 of the Act, provision is made for the withdrawal, on notice, by a Roman Catholic, from support of a Public School to support a Roman Catholic school : and sec. 47 provides, as it seems to me, for withdrawal by a Roman Catholic, from support of a Roman Catholic Separate School, to become again a Public School ratepayer ; but no provision, that I can find, is made for the withdrawal of a Roman Catholic Separate School supporter from one section or school to support another.

It seems to me to be reasonably plain, that the incorporation is to be, by Roman Catholics, within an existing Public School section, and that the boundaries and numbers are to be the same as those of the Public School section.

I therefore find no authority for the attempt to become incorporated, here, and I think that, on this ground also, the plaintiffs fail.

But it was urged that the defendants are estopped from denying the corporate capacity of the plaintiffs, or their right to the taxes in question.

If these taxes had been collected by the defendants for Judgment. the plaintiffs, according to the provisions of sec. 55 of the Meredith, J. Act, it might well be contended that the defendants were bound to pay over to the plaintiffs the amount collected, as that section provides. But they were not so collected. At the August meeting of the council, the conflicting claims of the plaintiffs, on the one side, and of the trustees of Roman Catholic Separate School section No. 6, and of the trustees of Public School section No. 10, on the other side, were made. The matter was twice postponed for consideration, and to procure legal advice; and, at the October meeting of the council, and after due notice to the plaintiffs, was disposed of by giving effect to the claims of the others, and rejecting that of the plaintiffs. It is thus put in the minutes of that meeting :

October 3rd, 1887. The Reeve presented solicitor's opinion respecting school matters submitted to him, which was read for the information of the council. The opinion given being that \* \* in the case of the new Roman Catholic Separate School in No. 10, both the Roman Catholic separate school ratepayers as well as the Protestant school ratepayers who have joined said school, must pay to their previous school and section for the current year.

After a lengthened discussion, it was resolved to act according to the advice of the solicitor, and that the clerk be authorized and required to charge the school taxes in accordance with said opinion—namely, all parties concerned to pay this year as formerly.

And a by-law for levying and collecting accordingly was then duly passed; and the sum in question is comprised in the amount collected, under it, for Roman Catholic Separate School section No. 6, and Public School section No. 10.

There is no room for doubt about the plaintiffs knowing that their claim would not be complied with, or acknowledged, by the municipal council. The trustee Goetz makes that very plain in his testimony, thus:—

“Q. The council refused to levy the rates for you? A. Yes.

“Q. Said they would levy them on your people? A. Yes.



Judgment.

Meredith, J.

“Q. For number 10 Public and number 6 Separate? A. Yes, that was their intention all along.”

So that, rather than the defendants having no answer to the plaintiffs' claim, they would have no answer to the claims of the trustees of the other school sections; and, it seems to me, the plaintiffs' remedy, if a duly incorporated body, and entitled to impose rates, was by way of mandamus or injunction, to compel the municipal council to take the necessary steps, under section 58 for the levy of their rates, and to restrain them from levying for the others.

It was likewise urged that these ratepayers were entered upon the assessment roll of the township by the township assessor, as supporters of Separate School No. 10, and that the defendants and the trustees of the other school sections, as “persons concerned” are, under the Assessment Act, bound by the roll.

If that were so I do not understand how it would give the plaintiffs the right to the taxes in question, imposed and levied as they were, though it might give them a right to the relief before mentioned.

But an examination of the roll shows that there was no compliance by the assessor with the statutory requirements in this respect. The assessor did not, in the roll, set down the religion of the person taxable, distinguishing between Protestant and Roman Catholic, and whether supporters of public or separate schools. What appears upon the roll is a column headed “No. of School Section;” and another adjoining column headed “Public or Separate School Supporter.” Of the 939 assessments contained in the roll, there is no entry at all, in either of these columns, in 908 cases; in 30, there is the number 10 in the first, and there is the letter S in the second, column; and in one, there is the number 6 in the one, and the letter S in the other, column.

The assessor testified that these few entries were so made at the request of the plaintiffs.

I cannot think that the plaintiffs, having no legal existence, are, by reason of these entries, so made, to be treated

as a duly incorporated body, entitled to the taxes in question imposed by, and collected for, the other duly incorporated bodies. If so they would be entitled to them even if collected by the other bodies, as they might have been, without the aid of the defendants.

There is also the provision of the Act in question, contained in section 43, that notwithstanding the withdrawal of a ratepayer from public school support, and becoming, after due notice, a Roman Catholic separate school supporter, he shall not be exempt from public school rates *imposed before the establishment of the separate schools*. No separate school was here established; the proceedings taken were wholly ineffectual.

The *Burford Case*, 18 O. R. 546, was much relied on for the plaintiffs, but that case is not an authority for what is here contended for. It also was determined by the trial judge in this case.

And it was further contended that payment of the greater portion of these taxes was made on the faith of a resolution of the council providing for the payment of the whole of the taxes in question to the plaintiffs. But while one cannot but condemn the vacillating and irregular conduct of the members of the council who took part in the meetings of the 4th and 7th of January, and especially, if the memory of the township clerk in that respect is to be depended upon, the want of candour and fair play in the instructions to him, or understanding among themselves not to publish the proceedings of the second meeting, or let them be known, for two or three days, I do not think it can affect the question in issue between the parties. The taxes were due and payable; the municipal council were entitled, and bound, to collect them for Roman Catholic separate school section No. 6 and public school section No. 10. The refusal of these ratepayers to pay was wrongful; the wrong of the council did not put them right; they cannot be treated as if they were acting rightly in refusing payment. And, as a matter of fact, there does not appear to be really so much in the complaint as has been made of

Judgment.

Meredith, J.

Judgment. it. The witnesses who most complain of it are the trustees, Meredith, J. Goetz, and Lehmann, and O'Donnell. Goetz paid his own taxes after he became aware of the second meeting and its proceedings; Lehmann was not quite sure that he had not paid his in November; and O'Donnell, who appears to have acted throughout as adviser and advocate for the plaintiffs, says, "They had their taxes with them, and finally we concluded that *as the Minister's decision covered all taxes* they might pay them with safety." And of those persons who complain of the resolution of January 4th having been "passed before their faces and rescinded behind their backs," O'Donnell and Goetz seem to have thought it quite right to go, as they did, to Toronto, and interview the Minister of Education, and advocate the plaintiffs' claims behind the backs of, and without any notice to, the other persons interested in the inquiry.

Upon the question of the proceedings before the Minister of Education, and his opinions, there seems to me to be room for little if any doubt. I think no other conclusion can be arrived at than that reached by the trial Judge. Whatever powers are, by section 67 of the Act, conferred upon the Minister of Education, there is not the power to make and unmake corporations contrary to the provisions of the Act. Disagreements "between trustees of Roman Catholic separate schools and inspectors of public schools, or other municipal authorities," cannot cover the matters in question here, between persons who are not trustees—because there was not a separate school section legally formed—and the municipal corporation. I incline to the view that full effect is given to the words of the Act, and the intention of the Legislature by holding that the section applies only to such matters as come within the internal economy of the educational system. And it seems, too, from the course of the proceedings—the manner in which the enquiry was conducted—that the Minister of Education must have been, during it, of the like opinion, and was acting more in an advisory or conciliatory manner between the parties, than in a judicial inquiry where the award would be final.

The action was properly dismissed with costs, and the Judgment.  
motion should be dealt with in like manner. Meredith, J.

See, in addition to cases mentioned upon the argument :  
*Re Hayes and Board of School Trustees, Toronto*, 3 C. P. 478; *Re Ridsdale and Brush*, 22 U. C. R., 124; *Free v. McHugh*, 24 C. P. 13; *Board of Trustees etc., Belleville v. Grainger*, 25 Gr. 570; 9 Vict. ch. 20, (C.) secs. 9 and 32; 13 & 14 Vict. ch. 48, sec. 13, sub-sec. 3, and sec. 19; 16 Vict. ch. 155, sec. 2; 18 Vict. ch. 131, secs. 2, 3, and 4; C. S. U. C., ch. 65, secs. 18, 19, and 20; 42 Vict. ch. 34 (O.), sec. 24, sub-sec. 3; R. S. O., 1877, ch. 206, sec. 29; R. S. O., 1887, ch. 227, secs. 40, and 43, and sec. 31, sub-sec. 17.

A. H. F. L.

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## [QUEEN'S BENCH DIVISION.]

## COFFIN V. NORTH AMERICAN LAND CO. ET AL.

*Statute of Limitations—Possession of land—Tenancy—Payment of taxes—Owners putting up new fence—Entry—Resumption of possession—Acts of possession—Sufficiency of—Summer crops—Drawing manure in winter—Vacant possession in winter.*

In 1857 or 1858 J. entered upon the land in question in this action as tenant to the true owners, upon the terms that he should pay the taxes, and he cultivated the land during his occupation. In the autumn of 1864 he gave up the place to the plaintiff, who paid him something for improvements, and in the spring of 1865 the plaintiff began to work upon it, living upon and occupying an adjoining lot of land, separated by a fence. The plaintiff disclaimed any knowledge of J.'s tenancy, and alleged that he entered as a purchaser of J.'s rights as a squatter, with the intention of acquiring a title by possession. In 1868 the true owners pulled down an old fence and put up a new one upon part of the land in question. In 1877 the plaintiff executed a writing under seal whereby he agreed to lease the land from the true owners and to pay as rent the taxes thereon and to give up possession when requested. From the time the plaintiff bought out J. till 1884, when he ceased to use or occupy the land, he grew crops and vegetables upon it in the summer and did nothing at all in the winter except draw manure upon it, which he spread in the spring:—

*Held*, following *Finch v. Gilray*, 16 A. R. 484, that the mere fact that the plaintiff paid the taxes was not sufficient to keep the right of the owners alive against him; but what was done by the owners in 1868 was an entry upon the land in the capacity of owners, an assertion of their rights as such, and a resumption of possession for the time being, before the statute then in force had given a title to the plaintiff, and it furnished a new starting point; and, further, that what the plaintiff did upon the land did not shew such a possession as entitled him to assert that he had acquired a title as against the true owners.

The acts done in the winter did not constitute an occupation of the property to the exclusion of the rights of the true owners, but were mere acts of trespass, covering necessarily but a very short portion of the winter, and, as the possession must be taken to have been vacant for the remainder of it, the right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken again in the spring by the plaintiff.

## Statement.

THIS action was brought by the plaintiff to obtain a declaration that he was the owner in fee simple by length of possession of lots 80, 81, and 82 on the east side of Markham street, in the city of Toronto. It was tried at the Toronto Autumn Assizes on 8th October, 1890, before ARMOUR, C. J., without a jury, and the action was dismissed with costs, upon the ground that the plaintiff had not proved the kind of possession necessary to shut out the true owner;

and upon the further ground that the plaintiff had entered <sup>Statement.</sup> under one Jones, who was a tenant, and must under the circumstances be treated as having continued in possession as tenant. The material facts are stated in the judgment of the Divisional Court.

The plaintiff at the Michaelmas Sittings of the Divisional Court, 1890, moved to set aside this judgment and to enter judgment for the plaintiff.

The motion was argued before the Divisional Court (FALCONBRIDGE and STREET, JJ.) on 19th November, 1890.

*J. W. McCullough*, for the plaintiff. The plaintiff claims under Jones, and also that he has had sufficient possession without Jones. The lease said to have been executed by the plaintiff in 1877 was in fact not executed till 1884. But apart from that the plaintiff ought to succeed by virtue of his possession from 1864 to 1877. During all this time no other person was in possession. The only evidence of a lease to Jones was that of a son of Jones, who said his father told him of it; but this witness contradicts himself, for he says his father had the place for the taxes. If that were so, *Finch v. Gilray*, 16 A. R. 484, settles that that is not a tenancy. As to possession, the plaintiff was working on the land all these years and putting manure on in winter.

*Foy*, Q. C., for the defendants the North American Land Company. This case was disposed of at the trial upon the plaintiff's own shewing. The defendants did not go into their case, but they had witnesses to shew the slim nature of the plaintiff's possession and to shew entries made on behalf of the true owners, and also to shew the existence of a mortgage which, according to *Cameron v. Walker*, 19 O. R. 212, would prevent the statute running. The plaintiff's occupation was not sufficient under the authorities; but even if it were sufficient, the plaintiff's execution of the lease in 1877 put the true owners in the position of being able to give a good title, and he cannot now dispute the title. By the lease the plaintiff is estopped as against subsequent purcha-

Argument.

sers. The defendants have been in possession since the lease to the plaintiff, by the plaintiff and others as their tenants. The plaintiff cannot claim any benefit from Jones's possession; there is no evidence to shew what possession Jones had. If he was in possession, it was as tenant; he left in the autumn of 1864, and the plaintiff did not go there till the spring of 1865. The building of the fence on the land in 1868 by Kennedy, who was sent there by the true owners, was an entry which stopped the running of the statute.

*F. E. Hodgins*, for the defendant Long. The plaintiff is clearly estopped as against Long, because he stood by and saw him make improvements without objection: *Ramsden v. Dyson*, L. R. 1 H. L. 129. As far as Long is concerned, the plaintiff cannot say the lease was a fraud.

*MacGregor*, for the defendants Hannah and Nelson, referred to *Palmer v. Johnson*, 13 Q. B. D. 351; *Pilcher v. Rawlins*, L. R. 7 Ch. 259.

*McCullough*, in reply, cited *Doe Perry v. Henderson*, 3 U. C. R. 486; *Hillock v. Sutton*, 2 O. R. 548.

March 6, 1891. The judgment of the Court was delivered by

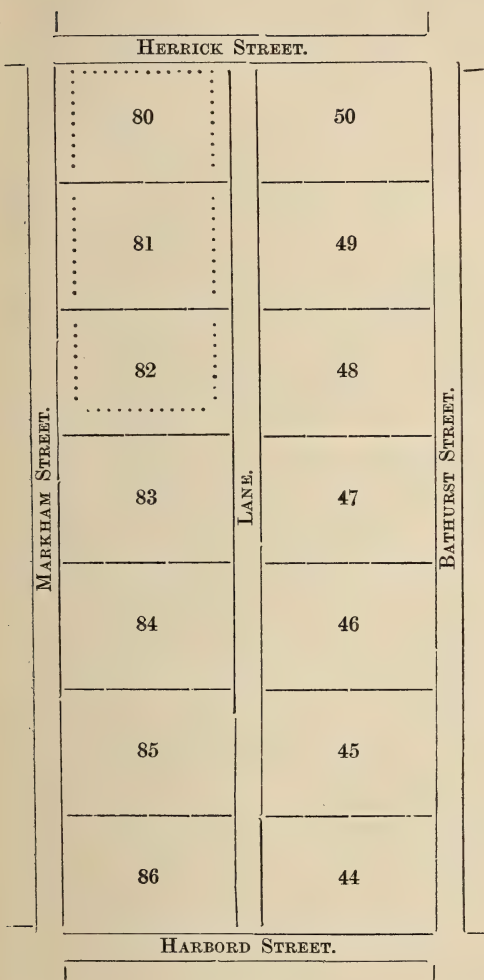
STREET, J. :—

The land claimed by the plaintiff is part of a block of lots bounded by Bathurst street on the east, Harbord street on the south, Markham street on the west, and Herrick street on the north. The following diagram shews the situation of the three lots, 80, 81, and 82, claimed by the plaintiff in this action:

The lots in question, with other portions of the block, not including lots 49 and 50, had been let by the owners of the whole property some two or three years before the American war, that is to say, about 1857 or 1858, to one Robert Jones, as their tenant, upon the terms that he should pay the taxes, and he had cultivated the portions of which he was tenant. In the autumn of 1864 he gave up the

Judgment.

Street, J.





Judgment. place to the plaintiff, who paid him, he says, \$65 for some  
Street, J. improvements upon the place, and the plaintiff in the  
spring of 1865 began to work upon it. At the same time  
the plaintiff contracted to purchase, from the owners of the  
block, lots 49 and 50, and entered into possession of them  
and occupied the house upon them, and continued to do so  
until 1889. The plaintiff denies that any fence existed  
between the two lots he bought and the property which  
he now claims; but it is very positively stated by one of  
his own witnesses, William Jones, a son of the original  
occupant Robert Jones, that a fence did exist fencing off  
lots 49 and 50 from lots 80, 81, and 82, and from the rest  
of the land, so that his father's cattle, as he says, could  
not get upon the two lots 49 and 50. The plaintiff's posi-  
tion then, was that he lived upon and occupied lots 49  
and 50 as purchaser from the owners of the whole block,  
and that he was either a tenant of or a trespasser upon  
the greater part of the remainder of the block, including  
lots 80, 81, and 82. The fences, as the plaintiff describes  
them, were as follows: Commencing at the middle of lot  
48 on Bathurst street and running south along Bathurst  
street to the corner of Harbord street; then along the north  
side of Harbord street to the east limit of Markham street,  
then north along the east side of Markham street to the  
corner of lot 82; then west across Markham street to the  
west side of that street; then north along the west side of  
Markham street to the corner of Herrick street; then down  
the north side of Herrick street to the lane; then along the  
west side of the lane north to Bloor street. Then, he says,  
the fence was continued from the lane on Herrick street  
through to Bathurst street. He says he put up fences  
after he bought in front of the lots he bought and of the  
next lot adjoining on the south, which would be the north  
half of 48; so that there were no fences there when he  
bought, and the reasonable conclusion is that as there was no  
fence on the front of 48, 49, and 50, there must have been  
one in their rear, otherwise the lots occupied by Jones must  
have been open at this place, an unlikely state of things.

when it is found that Robert Jones, as well as the plaintiff, kept horses and cattle there.

Judgment.

Street, J.

The plaintiff says that from the time he bought out Jones he grew vegetables and crops upon the land he now claims, in the summer, and that they "lay dormant in the winter time;" that nothing at all was done upon it in the winter, except that he drew manure upon it and spread it in the spring.

In 1868 the owners sent a man named Kennedy on their behalf, who took down the fence that had existed upon Markham street and replaced it, in exactly the same position, by a new one.

On November 14th, 1877, Messrs. H. L. Hime & Co., agents for the owners of the property, wrote to the plaintiff as follows: "We must request you to sign a lease at a nominal rent for the lots you are in possession of in rear of your house on Bathurst street, or else to give up possession of them."

On the 29th of November, 1877, the plaintiff executed an agreement under seal with the owners of the land whereby they agreed to lease to him and he agreed to take from them the three lots now claimed by him; by this instrument he agreed "to pay rent for the said land, which rent is to be the taxes and assessments thereon," and to give up possession at any time when requested, on being paid for his crops then in the ground. Under this lease he remained in possession until 1884, and then ceased to occupy or use the land in any way.

The defendant Long, after this, purchased from the owners and built a house upon part of lot 82; the plaintiff lived on lots 49 and 50, and saw the house built and completed without giving any notice of his claim. In 1889 Nelson and Hannah bought portions of the other lots, and in January, 1890, the plaintiff notified them that he claimed to be the owner.

Robert Jones must be taken upon the evidence to have entered as tenant to the owners of the property paying the taxes for the use of it, and the plaintiff, having entered

Judgment.

Street, J.

under him, would be estopped at any time within the statutory period from disputing the title of the persons who let to Jones, but he was not prevented from acquiring a statutory title against them even though he had entered under them, provided his possession were sufficient and that he paid no rent. In *Finch v. Gilray*, 16 A. R. 484, it was decided that the payment of the taxes by a person who had entered as tenant and agreed to pay the taxes was not equivalent to the payment of rent, and in accordance with that decision we are, I think, bound to hold that the mere fact that the plaintiff paid the taxes was not sufficient to keep the right of the owners alive against him. He disclaims, however, any knowledge of the tenancy of Jones at the time he purchased, and swears that he entered, not as a tenant, but as a purchaser of Jones's rights; he says that Jones was a squatter and that he himself took possession of the land with the intention of acquiring a title by possession. He must, therefore, upon his own view of the transaction, be treated as a trespasser.

When the true owners pulled down the old and built the new fence in 1868, they entered upon the land, because the fence touched the south-west corner of lot 82, then continued across Markham street, at that time unopened, and ran it along the west side of Markham street and the north side of Herrick street, thus not only touching the very land claimed by the plaintiff, but actually tearing down and rebuilding the only fence which enclosed the property which he claims. This, I think, upon the authorities, must be taken to have been an entry upon the land in the capacity of owners, an assertion of their rights as such, and a resumption of possession for the time being. See *Donovan v. Herbert*, 4 O. R. 635, where it was held that the putting up of boards on the land by the owner stating that the land was for sale was a sufficient entry on his part to vest the legal possession in him. See also *Griffith v. Brown*, 5 A. R. 303. This new fence was built some ten or eleven years after Jones had obtained possession, and was clearly before the statute then in force had

given a title to the plaintiff, and it furnished a new starting point. In 1877 the plaintiff executed an agreement, after a threat that he would be evicted, in which he acknowledged himself to be tenant and promised to give up possession when required; in 1884 he gave up possession and never resumed it, and although living on the adjoining land he made no claim of any kind until the end of 1889.

Judgment.  
Street, J.

*Sanders v. Sanders*, 19 Ch. D. 373, is authority, if any were needed, to shew that a mere acknowledgment of tenancy, given by a person in whose favour the statute has already run for a sufficient time to give him a title, does not operate to revest the title in the former owner; but that case also shews, as pointed out by the Court in *Donovan v. Herbert*, 4 O. R. 635, that a claim of title under the Statute of Limitations is not treated with much favour when the parties have not been acting as if it were binding upon them.

I think, further, that the plaintiff has failed to shew such a possession as entitles him to assert that he has acquired a title as against the true owners. The Supreme Court in *McConaghy v. Denmark*, 4 S. C. R. at p. 632, point out that "by a long unbroken chain of decisions extending over a period of upwards of forty years, it has been held by the Courts in Upper Canada that the possession which will be necessary to bar the title of the true owner must be an actual, constant, visible occupation by some person or persons \*\* to the exclusion of the true owner for the full period of twenty years." The period is now reduced, but the tendency since *McConaghy v. Denmark* has been more than ever in the direction of requiring satisfactory proof of a possession answering in all respects the conditions above indicated. See *Harris v. Mudie*, 7 A. R. 414, and *Griffith v. Brown*, 5 A. R. 303.

The plaintiff here cropped the land in question during the summer; during the winter he did nothing to it but draw some loads of manure upon it. If he had been living upon the property on which this was done, and had had a colour of right, I think these would have been suffi-



Judgment.  
Street, J.

cient acts of ownership to have given him a title under the statute. But he lived upon a lot separated by a fence from the one which he claims; he was a mere trespasser, and the fence enclosing the land which he claims was kept up by the true owner. Under these circumstances we are entitled to look strictly into the facts upon which he relies to support his claim. Remembering that he was a trespasser by his own admission, we must see whether his possession was an actual, constant, and visible occupation, leaving out of consideration what his intention may have been. During the summer months and during the months when he was sowing the land and reaping his crop, his possession was clearly sufficient beyond question, but during the rest of the year his possession was not actual, nor constant, nor visible. During each winter he says that he drew some manure upon the place and in the spring he spread. Excepting for this he withdrew absolutely to his own lot, which adjoined but was separated by a fence from that of which he claims the possession. The winter months must be separated from the summer months and we must look at the acts of possession done during those winter months by themselves. Doing this, I think the acts done in the winter did not constitute an occupation of the property to the exclusion of the right of the true owner, but were mere acts of trespass, covering necessarily but a very short portion of the winter, and that the possession must be taken to have been vacant for the remainder of it. The right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken in the spring again by the plaintiff: *Agency Co. v. Short*, 13 App. Cas. 793.

Upon both grounds, therefore, I think that the action should fail and that the motion should be dismissed with costs.

## [QUEEN'S BENCH DIVISION.]

## LONEY V. OLIVER.

*Damages—Measure of—Breach of agreement to convey land—Loss of bargain previously made.*

Loss of profit sustained by, and the expenses which a purchaser of lands has been put to, on a resale by him, unknown to his vendor, before such purchaser has entered into a binding contract for purchase, are not damages naturally flowing from the breach of the latter agreement, and cannot be recovered by him against his vendor.

In such a case, if recoverable at all, the true measure of damages would be the increased value of the land, at the time of the breach, over the purchase money.

THIS action was brought to recover damages for the non-Statement. performance by the defendant of an agreement to grant and convey to the plaintiff certain lands in the city of Toronto, for the sum of \$3,500, the plaintiff alleging that the defendant neglected and refused to convey the lands to the plaintiff, and that, by reason thereof, Thomas and Walker, to whom the plaintiff had agreed to sell the lands, refused to carry out their agreement with the plaintiff, and the plaintiff lost the sale of the lands to them, and was deprived of the profit of \$4,500 which he otherwise would have made, and was put to considerable trouble and expenditure in his endeavour to carry out his agreement with Thomas and Walker, and expended money by way of commission upon the sale and otherwise, and disbursed money to his solicitors in his endeavour to carry out the sale, and otherwise was put to considerable expense and trouble in the premises.

The action was tried at the Toronto Chancery Sittings in the Autumn of 1888 before BOYD, C.

The written articles of agreement between the plaintiff and defendant, and between the plaintiff and Thomas and Walker, were proved, and it appeared that the agreement between the plaintiff and defendant was entered into on the 16th May, 1888, and that the agreement between the plaintiff and Thomas and Walker, was entered into on the 12th May, 1888.

Statement. BOYD, C., held that there had been a breach by the defendant of his covenant in the articles of agreement, and referred it to the Master to assess the damages, reserving further directions and costs.

At the Michaelmas Sittings of the Divisional Court, 1888, the defendant moved to set aside the judgment of the trial Judge, and to dismiss the action or for a new trial.

The motion was argued before ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on the 5th December, 1888.

*Moss*, Q. C., for the defendant.

*J. W. McCullough*, for the plaintiff.

February 4, 1889. The judgment\* of the Court was delivered by

ARMOUR, C. J. :—

\* \* \* \* \*

Assuming, however, that a breach of the defendant's covenant was shewn to have been created, what damages were shewn to which the plaintiff is entitled ?

It is abundantly clear from the evidence that the plaintiff was not prepared to carry out his part of the agreement unless he obtained the money from Thomas and Walker by carrying out his agreement with them, and no attempt was made by Thomas and Walker to carry out their agreement with the plaintiff, nor by the plaintiff to carry out his agreement with the defendant, until after the time fixed in the respective agreements for carrying out the same.

The agreement made by the plaintiff with Thomas and Walker was made before any binding agreement was made between the plaintiff and defendant ; and at the time the defendant entered into the articles of agreement with the plaintiff, he had no notice or knowledge of such

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\* A part only of the judgment, that relating to the question of damages, is reported.

agreement, and entered into them without any reference thereto; and I do not think that either the agreement entered into by the plaintiff with Thomas and Walker, or the bargain hereby made, or the loss thereon, or the damages flowing from such loss, can at all affect the rights or liabilities of the defendant under his agreement with the plaintiff; nor can the damages sustained by the plaintiff by the not carrying out by Thomas and Walker of their agreement with him form any element in the damages recoverable by the plaintiff from the defendant in respect of the breach of the agreement entered into between the plaintiff and the defendant. I cannot understand how damages to the plaintiff flowing from the agreement not being carried out made by him with Thomas and Walker before the making of the agreement between the plaintiff and the defendant, can be held to be damages naturally flowing from the breach of the latter agreement.

In *Walker v. Moore*, 10 B. & C. 416, where A. having contracted with B. for the purchase of a real estate, the vendor acting *bonâ fide* delivered an abstract shewing a good title; and A. before he examined it with the original deeds, contracted to resell several portions of the property at a considerable profit, the title turned out to be defective, and A. sought to recover his profit on the resales from B.; Bayley, J., said: "The plaintiff must shew that the damages which he seeks to recover arose from the act of the defendants and not from his own haste. \* \* But if premises for which a party has contracted are by him offered for resale too soon, that is at his own peril, and the damage, if any, resulting from such offer, arises from his own premature act, and not from the fault of his vendor."

Littledale, J., said: "Nor am I prepared to say, that if such examination had been made the plaintiff could have recovered; for it seems to me to be contrary to the policy of the law, that a man should offer an estate for sale before he has obtained possession and a conveyance."

Judgment.

Armour, C.J.



Judgment. See also *Hanslip v. Padwick*, 5 Ex. 615; *Worthington Armour, C.J. v. Warrington*, 8 C. B. 134; *Gray v. Fowler*, L. R. 8 Ex. 249, per Blackburn, J., at p. 283.

If damages were recoverable at all by the plaintiff from the defendant for loss of bargain, by reason of the breach by the defendant of his covenant to convey, the true measure of damages would be the increased value of the land, at the time of the breach, over the amount of the purchase money.

No evidence whatever was given of any such damages, and evidence of the bargain that the plaintiff made with Thomas and Walker, before he bargained with the defendant, was not evidence relevant to this inquiry.

\* \* \* \* \*

*Action dismissed with costs.*

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## [CHANCERY DIVISION].

## LASBY V. CREWSON.

*Will—Mistake—Construction—Direction to divide in impossible fractions—  
Principle of construction in such cases.*

A testator by his will directed : “ When my youngest son is of the age of eighteen years, my estate shall be divided among my children then living, *i. e.*, to each of my sons I leave two-thirds, and to each of my daughters, one-third of all my estate and effects.” When the youngest son attained eighteen, there were then twelve children living, seven daughter and five sons :—

*Held*, that the most reasonable and satisfactory construction of this clause, having regard to the words used, was that each child should have a share, but that each son’s portion should be double that of a daughter.

The principle of construction in such cases of mistakes in wills is, that the “ words are not corrected, but the intention, when clearly ascertained, is carried out notwithstanding the apparent difficulty caused by the particular words.”

THIS was an action brought by the executors of the will Statement.  
of Oliver Lasby, for the construction of the will, which was dated November 26th, 1859, and for the sale and distribution of the testator’s estate in accordance with it. The defendants were the beneficiaries under the will.

The will contained the clause set out in the judgment of BOYD, C., where all the circumstances are sufficiently stated.

The action was tried at Guelph, on April 17th, 1891, before BOYD, C.

*D. Guthrie, Q. C., and J. Watt*, for the plaintiffs.

*McMurchy, D. Burke Simpson, N. G. Bigelow, G. W. Field, T. P. Coffee, and J. A. Mowat*, for the various defendants.

April 20th, 1891. BOYD, C. :—

The clause which calls for construction is thus expressed :  
“ When my youngest son is of the age of eighteen years, my estate \* \* shall be divided among my children then living, that is to say, to each of my sons I leave two-

Judgment.

Boyd, C.

thirds, and to each of my daughters, one-third of all my estate and effects." The will is said to be the work of a schoolmaster; his notions of fractions are peculiar, but it is a relief to think he belonged to a past generation, as the document dates back to 1859.

When the youngest son attained eighteen, there were then twelve children living, seven daughters and five sons. Two have since died, but that period, which was in 1872, fixes the vesting of the estate in these twelve. Three modes of distribution are possible, and have been argued before me: (1) that the clause two-thirds to each of the sons, and one-third to each of the daughters, is nonsensical and impossible, and should be entirely rejected so that the estate should be equally divided among the twelve:

2. That the clause should be so read as to give two-thirds of the whole estate to the sons, and one-third to the daughters:

3. That each child should have a share, but so that a son's portion shall be double that of a daughter.

The first should be rejected, because the testator does not contemplate equality, but disparity of division as between sons and daughters. The second does not commend itself, because the testator is not dealing with the male and female groups of his family, but has all in his mind as individuals.

This brings us to the third result, which appears most reasonable and satisfactory, having regard to the words used. A literal construction cannot be given to the language used, but by the last expedient, no words need be omitted. The only displacement is of the meaning to be attached to the word "thirds;" that is used as equivalent to "fraction," *i. e.*, part or share. What he says is, all my estate and effects to be divided among my children, to each of my sons, two parts, and to each of my daughters, one part. This will be accomplished by a division of the whole into seventeenths, giving to the seven daughters, seven-seventeenths, and to the five sons, ten-seventeenths. The numerous cases as to mistakes in wills, yield the princi-

ple which has been neatly condensed by Sir Frederick Pollock, in the last edition of his book on Contracts, thus: "The words are not corrected, but the intention, when clearly ascertained, is carried out notwithstanding the apparent difficulty caused by the particular words:" *Appendix, Note I. p. 707.*

Judgment.  
Boyd, C,

A. H. F. L.

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[CHANCERY DIVISION.]

ALDOUS V. HICKS ET AL.

*Mortgage—Assignment of equity of redemption—Principal and surety.*

Where a mortgagor has assigned his equity of redemption, the assignee covenanting with him to pay the mortgage debt, though as between the mortgagor and the assignee the latter thus becomes primarily liable for the debt, this does not create any privity of contract between the assignee and the mortgagee; and the mortgagor cannot contend as against the mortgagee, that he has become a mere surety for the debt, and, as such, has been released by certain dealings between the mortgagee and assignee of the equity of redemption, unless such dealings constitute a new contract between them.

*Mathers v. Helliwell*, 10 Gr. 172, distinguished.

THIS was an action brought by J. E. P. Aldous against W. Stivens Hicks, and Louisa J. Riches, for redemption or sale of certain lands comprised in two mortgages from Hicks to him, dated respectively July 20th, 1886, and July 20th, 1888, upon certain lands in the township of Barton, Louisa J. Riches being the owner of the equity of redemption at the time of action brought.

The defendant Hicks, in his defence, alleged that on December 8th, 1886, he sold the lands to one Ralston, who thereupon became the party primarily liable to pay the mortgage moneys, and who on June 14th, 1888, sold the lands to the defendant Riches, who then became, and had since remained primarily liable for payment of the said moneys: that the plaintiff had since the said conveyances always dealt with Ralston and Riches as the parties liable to pay, and had from time to time by agreement with

Statement.



Statement. Ralston and Riches, but without the knowledge or assent of him, the defendant Hicks, extended the time for payment; and he contended that, if in any way liable after the said conveyances to Ralston and Riches, he was so as a surety only, and that by reasons of the plaintiff's dealing and laches, he had been discharged from any such liability.

The action was tried before BOYD, C., at Hamilton, upon March 23rd, 1891.

*F. Mackelcan*, Q. C., and *Martin*, for the plaintiff, were not called upon.

*N. F. Davidson*, for the defendant Hicks, contended that Hicks, though the mortgagor, became after transfer of the land to Riches, merely surety for payment to Riches, the plaintiff having recognized Riches as being liable to pay, and was consequently discharged by various extensions of time given to Riches, and cited Baylies on Sureties, pp. 242, 263, 491, 493; *Calvo v. Davies*, 73 N. Y. 211; *Paine v. Jones*, 76 N. Y. 274; *Mathers v. Helliwell*, 10 Gr. 172; *Archbold v. Building and Loan Association*, 16 A. R. 1; *Oakeley v. Pasheller*, 4 Cl. & F. 207; *Oriental Financial Corporation v. Overend Gurney & Co.*, L. R. 7 H. L. 348; *Munster and Leinster Bank v. France*, L. R. 24 Ir. 82.

March 25th, 1891. BOYD, C. :—

Though the defendant Riches purchased the equity of redemption and covenanted to pay the mortgage, and so has become primarily liable for the mortgage debt as between her and the mortgagor, that does not create any privity of contract between her and the plaintiff, the mortgagee. No right of action arose to the plaintiff whereby he could recover the mortgage debt directly from the purchaser: *Clarkson v. Scott*, 25 Gr. 373; *Norris v. Meadows*, 7 A. R. 237.

There is, therefore, at the outset, an absence of the three-fold relation of creditor, principal debtor, and subsidiary debtor or surety upon which the equitable doctrines invoked operate. No fact is proved which changes this original constitution of the parties. This one material point (absence of right of action against the so-called principal Riches) distinguishes this from the authorities relied upon. In the nearest case *Mathers v. Helliwell*, 10 Gr. 172, there was a direct dealing between the mortgagee and the purchaser of the equity, as to the interest, which constituted a new contract upon which the purchaser became personally liable. That element is wanting here, and besides the evidence falls short of proving any binding agreement to extend the time in contravention of the terms of the mortgage. The mortgagee was always willing to receive his money or interest, and pressed for it, but never agreed with any one to give time for any defined period.

Judgment.

Boyd, C.

There should be the usual judgment as prayed—personal order to pay against Hicks, with order upon the other defendant to indemnify him against the judgment.

A. H. F. L.

## [QUEEN'S BENCH DIVISION.]

## ARMSTRONG ET AL. V. AUGER.

*Sale of land—Contract of sale—Local improvement rates—Incumbrances—Taxes—Vendor and purchaser—Independent covenants—Equitable relief—Payment into Court.*

A contract for the sale of land provided for payment of the purchase money in quarterly instalments ; when half was paid, the vendor was to convey and give the usual statutory covenants ; the purchaser was to pay taxes from the date of the contract.

In an action to recover instalments under the contract :—

*Held*, that local improvement rates imposed by municipal by-laws after the work having been done before, the date of the contract, were incumbrances to be discharged by the vendor ; but rates imposed and work done after the contract were not so.

*Re Graydon and Hammill*, 20 O. R. 192, followed.

*Les Ecclésiastiques de St. Sulpice de Montreal v. The City of Montreal*, 16 S. C. R. 400, distinguished.

*Held*, also, that the covenant for payment of the instalments and the covenant against incumbrances were independent ; and the vendor was entitled to judgment for the instalments ; but the purchaser was entitled to shew the existence of incumbrances as an equitable ground of relief, and, the time for completion of the contract not having arrived, to pay into Court so much of his purchase money as might be necessary to protect him against the incumbrances.

*McDonald v. Murray*, 11 A. R. 101, and *Tisdale v. Dallas*, 11 C. P. 238, distinguished.

## Statement.

ACTION tried before STREET, J., at the Toronto Assizes, on the 28th March, 1891.

The facts are fully stated in the judgment.

*Fullerton*, Q. C., for the plaintiffs.

*A. H. Marsh*, Q. C., for the defendant.

May 18, 1891. STREET, J. :—

This action was begun in the County Court of York, but was removed by order into this Division after issue joined.

The plaintiffs claim \$261.25 and interest, being the instalments of principal and interest due upon three contracts by which the defendant agreed to buy of them and they agreed to sell to her certain lands in the city of Toronto, (1) upon Huron street ; (2) upon Gerrard street ;

and, (3) upon Logan avenue. The agreements were all dated during February and March, 1889; and the purchase money was made payable in instalments extending over six or seven years. The defendant denied the agreements, denied the plaintiffs' title, and alleged that the property was subject to charges for local improvements.

The action was tried before me at the Toronto Assizes on 28th March, 1891.

At the opening of the case the defendant's counsel admitted that there was no defence to the claim so far as the lots on Huron street are concerned, and the plaintiffs are therefore entitled to judgment for the amount claimed as being due in respect of that parcel. At the close of the case the parties agreed that the contract for the sale of the Gerrard street lots should be cancelled and the money paid by the defendant refunded, leaving the question of the costs as to that part of the case to be disposed of by me; the amount of principal and interest to be refunded is agreed upon at \$140.80.

The remaining parcel is that on Logan avenue, and the defence with regard to it is that it was and is subject to charges for local improvements, which are incumbrances, and against which the defendant is entitled to be indemnified.

The agreement is dated 9th March, 1889, and is for the sale of lot 26 on the east side of Logan avenue for \$320, payable as follows: \$20 down, and the balance in quarterly instalments of \$15 each, with interest at seven per cent. on the unpaid purchase money; and contains amongst others the following stipulations:

"The vendors agree to convey the said lot by a good and sufficient deed, containing the usual statutory covenants, to the said vendee, when half the purchase money, with interest aforesaid, is fully paid, and to take a first mortgage," etc., "for the balance."

"The vendee agrees to pay taxes from date."

It is not specially provided that the purchaser may take possession, but the agreement appears to contemplate her

Judgment.  
Street, J.



Judgment. building upon it before becoming entitled to her conveyance.  
Street, J.

The particulars of the charges for local improvements assessed against the lot in question are as follows :

1. Widening the street.—The petition to make Logan avenue sixty feet in width certified by the city clerk, February 19th, 1887.

Assessment for same confirmed by the Court of Revision, June 17th, 1889.

By-law for borrowing the money on debentures passed 24th June, 1889.

Work commenced on October 25th, 1887, finished on September 1st, 1888.

Commutation rate \$2.10 per foot frontage.

Amount to commute on lot in question \$42.00. This extends over a term of ten years.

2. Sewer undertaken at the instance of city engineer and committee of board of works on sanitary grounds. Reported on by the engineer, 12th July, 1887. Assessment confirmed by Court of Revision, 17th June, 1889.

By-law for issue of debentures passed 24th June, 1889.

Work commenced 25th October, 1887, finished 1st September, 1888.

Commutation rate \$2.13 and two mills per foot frontage.

Total amount to commute on lot in question, \$42.64.

This extends over a term of twenty years.

3. The by-law to provide for borrowing money on debentures for construction of cedar roadway on Logan avenue from Gerrard street to Danforth avenue, (including the lot in question in this action) passed May 20th, 1890.

Assessment confirmed May 19th, 1890.

Work commenced 13th May, 1889, finished 12th September, 1889.

Commutation rate \$1.63 and seven mills per foot frontage.

Total amount to commute on lot in question, \$32.74.

This extends over a term of ten years.

Judgment.

Following the case of *Re Graydon and Hammill*, 20 O. R. 199, I think that the rates imposed and the charge created by the by-law for widening the street and that for the sewer, amounting in all to \$84.64, do create charges upon this land existing before the date of the contract, because the work was all done before that time, but that the by-law for the cedar roadway does not create a charge existing before the date of the contract.

Street, J.

It was argued by the plaintiff that the charges in question were "taxes," which the purchaser was bound to pay under the terms of the contract, and I was referred to the case of *Les Ecclésiastiques de St. Sulpice de Montreal v. The City of Montreal*, 16 S. C. R. 399. In that case an educational body were by statute declared to be exempt from municipal and school assessments, "whatever may be the Act in virtue of which such assessments are imposed," and the Supreme Court held that the statute had the effect of exempting them from payment of a sum of \$361 assessed against them by the city of Montreal for the construction of a drain along their property, the cost of which was charged as a local improvement. In that case there was no context to govern the meaning of the word "assessments" used in the Act, and it was coupled with expressions apparently intended to give to the word its most extended signification; the Court, therefore, gave to it an interpretation covering an assessment for the special purpose of a drain, as well as for the general purposes of the municipality.

The charges here, however, besides being in the nature of a tax, are also an incumbrance, and the duty of the vendor is to convey free from incumbrances. Is then the vendor to pay the charges as incumbrances, or is the purchaser to do so as taxes? I think the vendor should do so, for the reason given by the Chancellor in *Re Graydon and Hammill*, 20 O. R. 199, at p. 206: "When such local improvements are completed before the agreement for sale, it is to be supposed that the advantage thereby bestowed

Judgment.

Street, J.

upon the property has been taken into account in fixing the price." There may be other reasons, but this one is sufficient, in my opinion, in the present case.

The plaintiff then argues that, assuming these charges to be incumbrances which the vendor should remove, he is entitled to recover upon the covenant notwithstanding, because it is an independent covenant, and the vendor is not subjected by the contract to any conditions.

The later cases in this Province have, however, established the reasonable rule that a purchaser whose purchase money is payable by instalments which become due before his right to a conveyance arrives, is entitled to pay them into Court instead of to the vendor, where the vendor's title is defective or subject to incumbrances: *O'Keefe v. Taylor*, 2 Gr. 305; *Thompson v. Brunskill*, 7 Gr. 542; *Chantler v. Ince*, 7 Gr. 432; *Wardell v. Trenouth*, 24 Gr. 465; *Cameron v. Carter*, 9 O. R. 426; *Greenwood v. Turner*, 64 L. T. N. S. 261; see also Sugden on Vendor and Purchaser, 14th ed., p. 231.

The plaintiff relies upon *McDonald v. Murray*, 11 A. R. 101, and the cases cited in it; and upon *Tisdale v. Dallas*, 11 C. P. 238, as entitling him to recover upon the ground that his action is brought upon the covenant for payment, and that it is an independent covenant.

*Tisdale v. Dallas* was decided upon a demurrer, and is authority for the position that the covenant to pay here is an independent covenant, and would entitle the plaintiff to recover if there were no equitable defence; the facts set out in the plea clearly entitled the defendant to relief in equity.

The point decided in *McDonald v. Murray* was a very narrow one—viz., that, by the terms of the contract in question, the defendants were entitled to their conveyance upon payment of the purchase money sued for, and that the plaintiff, having failed to shew that he was ready, able, and willing to convey at the time of bringing his action, was not entitled to judgment for his purchase money. This case, also, therefore, went off upon strict legal prin-

principles, and without consideration having been asked or given to the equitable rights of the vendor.

Judgment.

Street, J.

Since the Judicature Act there seems no substantial distinction between a vendor's action to recover his purchase money and a vendor's action for specific performance, where the purchase money sought to be recovered is payable, as in *McDonald v. Murray*, contemporaneously with the delivery of the conveyance. The general rules governing the vendor's right to have the purchase money paid into Court under such circumstances, pending the inquiry as to title, are stated in Sugden's Vendor and Purchaser, 14th ed., p. 231. See also *Greenwood v. Turner*, 64 L. T. N. S. 261.

But where the action is brought, as here, for the recovery of instalments payable by the terms of the contract before the time for completion has arrived, the vendor appears entitled to judgment for them, unless some equitable ground of relief is shewn, as for instance, the existence of incumbrances or some defect in the title. Where the only objection is the existence of incumbrances to an amount not exceeding the purchase money, the overdue instalments should be paid into Court, and the same rule should, in general, govern where there are defects in the title and the defendant is in possession, unless he will go out of possession.

In the present case the covenant to pay being independent, and the time for completion not having arrived, the defendant has shewn the existence of charges which form an equitable ground for controlling its effect.

He must be allowed to pay into Court so much of his purchase money as may be necessary to protect him against the charges in question, unless the plaintiffs elect to pay the commutation at once and remove the trouble.

The costs which the plaintiffs should recover from the defendant in respect of the Huron street lots should be set off against those in respect of the Gerrard street lots, which I think the defendant should recover from the plaintiffs; and the defendant should recover from the plain-



Judgment.    tiffs the remaining one-third of the costs of the action,  
Street, J.    being those in respect of the Logan avenue lot, because the  
 plaintiffs have failed in their contentions with regard to  
 that lot.

The judgment will provide for the repayment by the  
 plaintiffs of the purchase money to be refunded in respect  
 of the Gerrard street lots, and the registrar can take the  
 accounts if the parties cannot agree upon them.

[QUEEN'S BENCH DIVISION.]

RE MCKAY v. MARTIN.

*County Court—Jurisdiction—Ascertainment of amount—R. S. O. ch. 47,  
 sec. 19, sub-sec. 2—Transferring action to High Court—54 Vic. ch. 14,  
 (O.), retrospective.*

An action was brought in a County Court to recover the amount of a  
 broker's commission on the sale of land. The defendant disputed his  
 liability, and the action was tried by a jury, who found that the plain-  
 tiff was entitled to recover \$250. The amount was not ascertained  
 otherwise than by the agreement of the parties, as found by the jury.

*Held*, by ROSE, J., that the amount was not ascertained within the mean-  
 ing of R. S. O. ch. 47, sec. 19, sub-sec. 2, and the County Court had no  
 jurisdiction.

*Robb v. Murray*, 16 A. R. 503, followed.

*Held*, by a Divisional Court, that the Act 54 Vic. ch. 14, (O.), passed  
 after the determination that the County Court had no jurisdiction, was  
 retrospective, and enabled the action to be transferred to the High  
 Court.

Statement.

THE action *McKay v. Martin* was brought in the  
 County Court of the county of Wentworth to recover  
 commission on the sale of land. The defendant disputed  
 his liability, and the action was tried by the junior Judge  
 of the county with a jury. The jury found that the  
 plaintiff was entitled to recover and that the commission  
 which the defendant had agreed to pay was one per  
 cent. upon the price at which the land was sold, viz.,  
 \$25,000. The Judge, however, refused to enter judgment  
 for \$250, being of opinion that the County Court had no  
 jurisdiction because the amount was more than \$200 and

was not "liquidated or ascertained by the act of the parties or by the signature of the defendant," within the meaning of sec. 19, sub-sec. 2, of the "County Courts Act," R. S. O. ch. 47, there being nothing in the evidence to shew an ascertainment of the amount except the agreement of the parties as found by the jury. The Judge made an order under Rule 1256 for payment of costs by the plaintiff to the defendant, but declined to make any other order.

The plaintiff then moved in the High Court for an order in the nature of a mandamus compelling the Judge to enter judgment for the plaintiff for \$250 with costs.

The motion was argued before ROSE, J., in Chambers on 16th December, 1890.

*Carscallen*, Q. C., for the plaintiff.

*Furlong*, for the defendant.

December 23, 1890. ROSE, J.:—

This was an application for an order of mandamus requiring the junior Judge of the county of Wentworth to deliver judgment upon the findings of the jury in this action. The action was to recover commission on the sale of land. The jury found for the plaintiff, assessing the amount of the claim, being one per cent. commission on the amount of the purchase money, or, as it is put in the notes of evidence, "being one per cent. commission on the sale." The learned Judge, in a considered judgment, held that the amount was not ascertained by the act of the parties, and declined to proceed further with the case. Mr. Carscallen says that, by reason of no judgment being entered either one way or the other, he is unable to appeal to the Court of Appeal, and that his only remedy is by mandamus. Mr. Furlong urges that mandamus will not lie, citing *Ex p. Milner*, 15 Jur. 1037; *Kernot v. Bailey*, 2 U. C. L. J. O. S. 178; and *Trainor v. Holcombe*, 7 U. C. R. 548.

Assuming for the moment that the motion is properly made, I have reviewed the authorities with some care. In

Judgment. *Durnin v. McLean*, 10 P. R. 295, I followed *Wallbridge v. Brown*, 18 U. C. R. 158, feeling bound by the decision in that case, and held that where parties contract that the one shall buy and the other shall sell so many pounds of butter at so much a pound, the amount is ascertained by the act of the parties, and so, I understand, was the opinion of the late Chief Justice of this Province in *Watson v. Severn*, 6 A. R. 559. The learned Chief Justice there referred to *Wallbridge v. Brown* as good law. *Wallbridge v. Brown* went farther than either *Watson v. Severn* or *Durnin v. McLean*, because in both *Watson v. Severn* and *Durnin v. McLean* the quantity upon which the agreed price was to be paid was agreed upon prior to the earning of the money. This case differs from *Watson v. Severn* and *Durnin v. McLean* in this respect, that although the one per cent. commission was agreed upon, the price at which the property was to be sold was not agreed upon, and was not ascertainable until the sale was made. I do not think, however, that this case is distinguishable in principle, on the facts, from *Wallbridge v. Brown*, and were it not for the decision in *Robb v. Murray*, 16 A. R. 503, I should have felt constrained to grant the order. In *Robb v. Murray* the words "act of the parties" were construed to mean, in effect, "stating an account," Mr. Justice Osler saying that the amount was to be "liquidated or ascertained as being due." In other words, that the parties by their joint act must settle the amount due, which in the case before me could only be done after the sale had been completed. The learned Chief Justice in *Watson v. Severn* seemed to think that "where the acts of the parties enable the Court at once, as a mere matter of computation, to ascertain what sum one party has agreed to pay to the other," the inferior Court would have jurisdiction "although oral testimony may be required to establish it." Mr. Justice Patterson, in the same case, puts his conclusion upon a different ground, namely, that the parties had, by actual settlement, liquidated or ascertained the amount due. It is possible that the decision in *Robb v. Murray* must be confined to

the facts of that case ; that is to say, Mr. Justice Osler at p. 506 says, "In my opinion a case of that kind, *which is the case before us*, is not within the scope of the section, etc." I do not know that the learned Judge intended to hold that if one party agreed to give any fixed sum for, say a horse, or in a case like the present to pay a fixed commission upon a named sum or price, for the property, that the amount to be recovered would not have been ascertained by the act of the parties, even though such act had been prior to the rendering of the services which caused it to become due. In principle, however, it seems to me that *Robb v. Murray* applies to this case, and that the amount can not be said to be ascertained by the act of the parties. Neither *Wallbridge v. Brown* nor *Durnin v. McLean* is referred to in *Robb v. Murray*. The jurisdiction of the learned County Court Judge is, to say the least, doubtful. I think I ought not, in the state of the authorities, to require the learned Judge to act, especially as my view, as expressed in *Durnin v. McLean*, leads me to doubt the correctness of that decision. I think I should feel justified in following the opinion of the Court in *Robb v. Murray*, in preference to that in *Wallbridge v. Brown*, if there is a conflict between the two.

Judgment.  
Rose, J.

I agree to the conclusion arrived at by the learned County Court Judge and refuse this application with costs.

The plaintiff appealed from this decision, and his appeal was argued by the same counsel before a Divisional Court composed of ARMOUR, C. J., and STREET, J., on the 3rd of February, 1891.

The Court reserved judgment.

While the case was still standing for judgment the Act 54 Vic. ch. 14 (O.) was passed, providing as follows:—

1. Where it appears at any stage of an action brought in a County Court that such Court has not cognizance thereof from any cause, a Judge of the High Court, or the Judge of the County Court before whom the action is pending, may order the action to be transferred to the High



**Statement.** Court, and the proceedings thenceforward shall be as provided by sections 23, 25 and 38 of *The County Courts Act* for like cases.\*

Pursuant to this enactment, the plaintiff moved before ROSE, J., for an order transferring the action from the County Court of the county of Wentworth to the High Court.

The motion was referred by ROSE, J., to the Divisional Court, and came on for argument before ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on the 5th June, 1891.

*Carscallen*, Q. C., for the plaintiff.

*Furlong*, for the defendant. The action is at an end and cannot be transferred. The statute passed since the action came to an end cannot defeat the defendant's right, which is a right to costs under the order of the Judge in the County Court. Also, there is a dilemma on account of the motion for a mandamus. If the order of Mr. Justice Rose is reversed, the present motion is useless; if it is affirmed, then the action was at an end seven months ago, long before this statute was passed. I refer to *Wright v. Hale*, 6 H. & N. 227; *Hughes v. Lumley*, 4 E. & B. 358; *Vansittart v. Taylor*, *ib.* 910; *Kimbray v. Draper*, L. R. 3 Q. B. 160; *Wolff v. Ogilvy*, 12 P. R. 645; *Pope v. Reilly*, 29 U. C. R. 495.

**Judgment.** THE COURT held that the matter in question, as affected by the statute, was a matter of procedure, and that the statute must be construed as retrospective and as applying to this action.

Order transferring the action to the High Court of Justice, Queen's Bench Division, with liberty to the defendant to move against the verdict at the next sittings of the Divisional Court. Costs in the cause.

\* It had been held previous to this enactment that where an action had been by mistake brought in a Court which had no jurisdiction, it could not be removed into a higher Court: see *Meyers v. Baker*, 26 U. C. R. 16; *O'Brien v. Welsh*, 28 U. C. R. 394; *Ferguson v. Sampey*, 10 C. L. T. Occ. N. 110.

## [QUEEN'S BENCH DIVISION.]

RE G———.

*Land Titles Act—R. S. O. ch. 116, sec. 23, sub-sec. 5—Evidence—Woman past child-bearing—Registration.*

Land was devised to the petitioner for life, with remainder in fee to her children surviving her. At the age of fifty-six the petitioner and one of her children, all the other surviving children having conveyed their shares to her, applied under the Land Titles Act, R. S. O. ch. 116, to be registered as owners with absolute title.

The petitioner's monthly periods began at the age of eleven; she was married in her twenty-second year, and bore children rapidly till her thirty-sixth year, when her tenth child was born; five months after this her periods, having regularly continued, suddenly ceased, and up to the time of the application had never returned.

The evidence of a physician who had made a medical examination of the petitioner shewed that senile atrophy of the uterus and ovaries had proceeded so far that it would be a moral impossibility for pregnancy to take place :—

*Held*, having regard to the provisions of sec. 23, sub-sec. 5, of the Act, that the Master should have accepted the evidence as sufficient proof that the petitioner was physically incapable of child-bearing, and should have acted upon it by granting the registration.

THIS was an appeal, by the petitioners, under sec. Statement. 129 of ch. 116, R. S. O., "The Land Titles Act," from a decision of the Master of Titles refusing the application of the petitioners to be registered as owners, with absolute title, of certain lands in the city of Toronto.

The facts appear in the judgment.

The appeal was argued before STREET, J., in Chambers on the 16th June, 1891.

*H. W. Mickle*, for the appellants.

*J. R. Cartwright*, Q. C., for the Attorney-General.

July 4, 1891. STREET, J. :—

The petitioner S. G. was devisee for life of the lands in question, with remainder in fee to her children surviving her, in equal shares. She had ten children, of whom three are dead; six of the others have conveyed to her their shares in the land; and the seventh, D. A. G., is a petitioner jointly with her. S. G. was born 10th August,

Judgment. 1834. She was married on 1st November, 1855, to W. H.  
Street, J. G. Her youngest child was born April 13th, 1870.

Two questions are raised : first, whether the evidence adduced is sufficient to shew that the petitioner S. G. is beyond the possibility of further child-bearing ; and, second, whether the Master should act upon that evidence by granting the registration which is asked for.

The petitioner S. G. swears that her menstrual periods returned after the birth of her last child, and continued for five months, when they suddenly ceased in the fall of the year 1870 ; and that they have never returned. She further states that menstruation began with her at the age of eleven years and continued regularly until it ceased as above stated, when she was in her thirty-seventh year.

We have here then the case of a woman in the fifty-seventh year of her age, whose monthly periods began at the age of eleven years, who was married in the twenty-second year of her age, and continued bearing children rapidly until the thirty-sixth year of her age, when her tenth child was born ; shortly after which time her periods, having regularly continued, suddenly ceased and have never returned during the twenty-one years which have since elapsed.

Facts much less cogent than these have been frequently treated by the Courts as creating so strong a presumption against the possibility of further child-bearing as to justify the payment out of Court of large sums of money to persons claiming upon the strength of the presumption : see the cases collected in *Browne v. Warnock*, 7 L. R. Ir. 3, (reported 1881-2.)

In the present case the petitioner has gone further in furnishing proof to satisfy the Court of the impossibility of her bearing further children than has been done in any of the decided cases. She has submitted to a medical examination made by Dr. Temple, whose evidence has been subsequently taken upon oath. He states that senile atrophy of the uterus and ovaries has proceeded so far that it would be a moral impossibility for pregnancy to take place.

Sub-sec. 5 of sec. 23 of ch. 116, R. S. O., "The Land Titles Act," prescribes the manner in which the Master of Titles is to conduct the examination of titles coming before him, and the evidence upon which he is to act; it directs that "The Master of Titles in investigating the title may receive and act upon any evidence which is now received by any of the Courts on a question of title; or any evidence which the practice of English conveyancers authorizes to be received on an investigation of a title out of Court; or any other evidence, whether the same is or is not receivable or sufficient in point of strict law, or according to the practice of English conveyancers, provided the same satisfies him of the truth of the facts intended to be made out thereby."

Judgment.  
Street, J.

Lord St. Leonards in his book on Vendors and Purchasers, (14th ed., p. 418), remarks that, "Courts of equity, as between the parties, sometimes act upon the presumption that a woman of an advanced age is past child-bearing, but no such presumption would be made against a purchaser."

This view is not adopted by the learned author of Dart on Vendors and Purchasers, who says (6th ed., p. 391; 5th ed., p. 346), that upon general principles, a title dependent upon such a presumption would, if necessary, be forced upon a purchaser, upon the ground that a purchaser can only require a moral, and not a mathematical, certainty of a good title from his vendor; citing *Lyddall v. Weston*, 2 Atk. 19, and *Hillary v. Waller*, 12 Ves. 252; but see the remarks of Mr. Baron Alderson in *Hutchinson v. Morritt*, 3 Y. & C. at p. 554. The view expressed by Mr. Dart was followed by Chatterton, V.-C., in the Irish case of *Browne v. Warnock*, 7 L. R. Ir. 3, above referred to.

The dictum of Lord St. Leonards, however, it will be observed, only deals with the presumption arising from advanced age that a woman is past child-bearing; here we have positive evidence that the atrophied state of the organs renders pregnancy a moral impossibility, and we are carried almost if not entirely into the region of mathematical certainty.



Judgment.

Street, J.

Looking then at the evidence which was before the learned Master of Titles, and at the statute which prescribes the nature of the evidence upon which it is intended that he shall act, I think that he should have accepted it as sufficient proof that the petitioner S. G. is physically incapable of child-bearing, and that he should have acted upon it by granting the registration applied for, assuming all other questions in the title to have been disposed of in the petitioner's favour.

The Deputy Attorney-General appeared upon the appeal, representing the assurance fund provided by the Land Titles Act, and opposed the allowance of the appeal upon the ground that the assurance fund was intended only to provide against objections which should happen to remain undiscovered during the investigation of the title, and not to questions actually raised upon the application for registration, as in the present case. I think, however, that the large powers given to the Master of Titles as to the nature of the evidence upon which he may act, by the section I have quoted, shew that it was not intended that he should withhold registration after having received proofs of a character which should be satisfactory, and that it is perfectly competent for him to deal with and dispose of questions such as that here raised upon evidence such as that here adduced.

I think, therefore, that the appeal should be allowed.

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## [COMMON PLEAS DIVISION.]

## REGINA V. HENRY.

*Criminal law—Sale of goods to defraud creditors—Immateriality of debt being due—R. S. C. ch. 173, sec. 28.*

Under the 28th section of R. S. C. ch. 173, every one who makes or causes to be made, amongst other things, any assignment, sale, etc., of any of his goods and chattels with intent to defraud his creditors, or any of them, is guilty of a misdemeanour :—

*Held*, that it is not essential under the Act that the debt of the creditor should, at the time of the sale, etc., be actually due.

THE prisoner was tried before His Honour Judge Jones, Statement.  
at the County Judge's Criminal Court for the county of Brant, on the 9th, 15th and 17th days of January, 1891, charged with an offence against the provisions of the 28th sec. of R. S. C. ch. 173, namely, "That he, the said Charles Henry, on or about the month of October, in the year of our Lord 1890, at the city of Brantford, in the said county, did make a sale of certain goods and chattels, to wit: 300 bushels of barley and 600 bushels of wheat of the goods and chattels of the said Charles Henry, to one David Plewes, with intent to defraud one Hugh McLaughlin and others then being creditors of the said Charles Henry.

And also for that the said Charles Henry, on the day and year and at the place aforesaid, did cause to be made a sale of certain goods and chattels, to wit: 300 bushels of barley and 600 bushels of wheat of the goods and chattels of the said Charles Henry, to the said David Plewes, with intent thereby then to defraud the said Hugh McLaughlin and others then being creditors of the said Charles Henry."

The following statement of facts accompanied the reserved case :

"It appeared from the evidence given at the trial, that the defendant was the tenant of a farm leased by him from one Hugh McLaughlin, for five years from the first day of December, 1889, at an annual rental of \$600, payable in equal half yearly payments, on the 1st day of June and the 1st day of December in each year. The defendant

Statement.

paid his first year's rent in advance. In the month of September, 1890, it was shewn that he sold all his wheat and barley to the said David Plewes as charged, and sold to other persons his crops of grain and hay, and also nearly all his stock and implements, and that he himself removed from and abandoned the farm, taking with him only his household furniture, and leaving behind him little of any value on the farm of his own property.

The defendant was at this time, and still is, indebted to several creditors in small sums, amounting in all to about \$180. And to Hugh McLaughlin, his lessor and chief creditor, he owed two promissory notes,—one of \$342.39, which would fall due on the 7th November, 1890, and another of \$115, which will fall due on the 14th October, 1891, said notes being for the purchase of chattel property sold by said McLaughlin to the defendant, to be used by the defendant in working said farm.

The evidence shewed that the defendant made the sales of his wheat and barley as charged, and also of his other property, with intent especially to defraud the said Hugh McLaughlin and to avoid the payment of the said notes; and I therefore convicted the said Charles Henry of the charge laid against him."

The question reserved by the learned County Court Judge for the opinion of the Justices of this Division was : "Whether a person whose debt is not due, as in the case of the said Hugh McLaughlin, is or is not a creditor within the meaning of sec. 28 of R. S. C. ch. 173 ? "

On February 15th, 1891, the case was argued before GALT, C.J., and ROSE and MACMAHON, JJ.

*Cartwright*, Q. C., for the Crown.

*DuVernet*, contra.

The arguments and cases referred to sufficiently appear from the judgment.

March 6, 1891. MACMAHON, J. :—

Judgment.

MacMahon,  
J.

The section under which the defendant was convicted provides that "every one who makes, or causes to be made, any gift, conveyance, assignment, sale, transfer or delivery of any lands, hereditaments, goods or chattels, or who removes, conceals or disposes of any of his goods, chattels, property or effects of any description with intent to defraud his creditors or any of them \* \* is guilty of a misdemeanour, and liable to a fine not exceeding \$800, and to one year's imprisonment."

"Creditor" is defined to be "one who trusts or gives credit ; correlative to debtor : " *Wharton's Law Lexicon*, 8th ed., p. 199 : "Creditor is he that trusts another with any debt, be it in money or wares. But the word is used in a larger sense to signify any one who has a legal claim against another : " *Abbott's Law Dictionary*, p. 322. "Properly one who gives credit in commerce ; but in a general sense, one who has a just claim for money ; correlative to *debtor* : " *Imperial Dictionary*, p. 467.

From a very early day under the statutes in England relating to bankruptcy a creditor by note payable at a future day might sue out a commission as well as come in as a creditor : *Ex p. Levi* (decided in 1733), 7 Viner's Ab-  
rig., 61. And under the more recent Bankruptcy Acts in England "creditor" means a person entitled to prove in the bankruptcy: *Grave v. Bishop*, 25 L. J. N. S. Ex. 58 ; *Wood v. DeMattos*, L. R. 1 Ex. 91. In *Moore v. Luce*, 18 C. P. 446, it was held under the Insolvent Act of 1864, that a creditor whose debt is immatured may commence proceedings against his debtor who is insolvent in like manner as he might have done if the debt had been over-  
due at the time.

Mr. DuVernet's argument was that it was only under the bankruptcy laws that creditors whose debts had not matured were enabled to take proceedings and prove in the bankruptcy, and that outside the Bankruptcy Acts "creditor" meant only those whose claims against their debtor had matured.



Judgment.

MacMahon,  
J.

It was also urged that it was by reason of the words "creditors *and others*" being in 13 Eliz. ch. 5, that those whose claims or debts had not matured could maintain an action to set aside conveyances as being fraudulent and void as against them.

In *May on Fraudulent Conveyances*, 2nd ed., 163, the author states: "It is conceived that the words 'creditors and others' are wide enough to include any person who has a legal demand against the settlor, so that he may rank as a creditor, although at the date of the settlement he may have no legal right to enforce it. The character of the claim, so long as it is a legal one, seems immaterial."

Apparently the class of persons included in the words "and others" applies even to those having claims or demands arising out of torts, and in respect of which actions for damages have been instituted or threatened against the settlor, who had made a conveyance attacked as being a fraudulent alienation of his property. This class is well illustrated by the cases of *Barling v. Bishopp*, 29 Beav. 417, where, after notice of trial in an action of trespass, the defendant executed a voluntary conveyance of his real estate to his daughter; and *Cameron v. Cusack*, 17 A. R. 489, where, in anticipation of an action for seduction being brought against him, the threatened defendant in that suit made a transfer of his property, which was held to have been made in good faith and for the purpose of paying his existing debts, and the Court of Appeal therefore held that such transfer or conveyance could not be impeached by the plaintiff in that suit. But Mr. Justice Osler, in his judgment, at p. 493, said: "He" (the plaintiff) "was, however, no doubt a person within the prohibition of the statute of Elizabeth, and entitled, on recovering judgment, to attack any transaction devised and contrived to hinder, delay or defraud him."

And in *Regina v. Smith*, 6 Cox. C. C. 31, (the only case in which the statute 13 Eliz. ch. 5, sec. 3, was known to have been made the basis of a criminal prosecution in England), the defendants were indicted for mak-

ing a feigned, covinous and fraudulent alienation and conveyance of property in order to defraud the prosecutor in that case of certain lawful damages said to have been sustained by him in respect of nuisance and injurious acts committed by one of the defendants; the fraudulent conveyance and alienation being made during the time that the legal proceedings were being carried on, and before the trial of the action under which the damages were claimed. And it was there held that it was not necessary that a judgment should first be recovered before criminal proceedings could be taken under that section of the Act against persons who were parting with their property fraudulently as against their creditors.

Judgment.  
MacMahon,  
J.

Under the Fraudulent Preference Act, R. S. O. (1877) ch. 118, sec. 2, where the words are: "In case any person, being at the time in insolvent circumstances, or unable to pay his debts in full \* \* makes or causes to be made any gift, conveyance," etc., "of his goods, chattels," etc. "with intent to defeat or delay the creditors of such person, or with intent to give one or more of the creditors of such person a preference over his other creditors," etc.; "every such gift, conveyance, assignment," etc., "shall be null and void as against the creditors of such person."

It was held in *MacDonald v. McCall*, 12 A. R. 593, that the plaintiffs who were simple contract creditors of Cox, the debtor, and whose debts were not due, could maintain an action on behalf of themselves and all other creditors of Cox (except the defendants) to have a mortgage given by Cox to the defendants declared void. Hagarty, C. J., in that case, said, at p. 596: "If a creditor could not impeach a fraudulent transfer until judgment the fraud might pass unpunished, and the property pass into the hands of innocent purchasers for value."

The point under consideration was expressly decided in *The People v. Underwood*, 16 Wend. 546. The defendant in that case was indicted under a statute similar to ours, which declared that "any person who shall remove any of his property out of any county, with intent to prevent

Judgment. the same from being levied upon by any execution, or who  
MacMahon, shall secrete, assign, convey, or otherwise dispose of any  
J. of his property with intent to defraud any creditor, or to prevent such property being made liable for the payment of his debts, and any person who shall receive such property with such intent shall, on conviction, be deemed guilty of a misdemeanour."

The objection was made in that case that the creditor in that Act meant a judgment creditor; but the Court held, at p. 547: "That the language of the Act plainly extends to all creditors;" and the learned Judge, who gave the judgment of the Court, said: "I can perceive no sufficient reason for restricting its construction to such creditors as have obtained judgments for their demands. The fraudulent removal, assignment, or conveyance of property by a debtor, which the legislature intended to punish criminally, usually takes place in anticipation of a judgment, and for the very purpose of defeating the creditor of the fruits of his recovery. If there must be a judgment before the crime can be committed, the statute will be of very little public importance. This is not like the case of a creditor seeking a civil remedy against a fraudulent debtor. There the creditor must complete his title by judgment and execution, before he can control the debtor in the disposition of his property; he must have a certain claim upon the goods, before he can inquire into any alleged fraud on the part of the debtor: *Wiggins v. Armstrong*, 2 Johns. Ch. N. Y. 144. But this is a public prosecution, in which the creditor has no special interest. The legislature has relieved the honest debtor from imprisonment, and subjected the fraudulent one to punishment, as for a criminal offence. The crime consists in assigning or otherwise disposing of his property with intent to defraud a creditor, or to prevent it from being made liable for the payment of his debts. The public offence is complete, although no creditor may be in a condition to question the validity of the transfer in the form of a civil remedy."

This must, from the very nature of the offence charged,

be the proper interpretation to be put upon the clause of our statute, otherwise a person might incur extensive liabilities by obtaining credit, and within a few days prior to the maturity of the claims of his creditors dispose of his entire estate, with intent to commit the very fraud aimed at by the Act, yet the law was powerless to reach him because he had been able, by the sale or other disposition of his property, to anticipate, even by a day, the maturing of the claims of his creditors.

It is said to be a benign rule of law that penal statutes must be construed strictly. But to accede to the contention of the counsel for the prisoner would be to fritter away the provisions of a most salutary enactment.

There must, in my opinion, be judgment for the Crown.

GALT, C.J., and ROSE, J., concurred.

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Judgment.  
MacMahon,  
J.



## [COMMON PLEAS DIVISION.]

GOODERHAM ET AL. V. THE CORPORATION OF THE CITY OF  
TORONTO.

*Way—Public highway—Dedication by plan—R. S. O. ch. 152, sec. 62—Acceptance by user—Recall of dedication—Consent of mortgagee to plan—Repurchase of portion of property—Opening of streets by Municipal Corporation—Necessity for by-law.*

A piece of land about twenty acres in extent, fenced in, had been owned and occupied as a field by the plaintiff and his predecessors in title for twenty-five years. Before that, it had, with other land, lying immediately to the north on which streets had been laid out and opened up, been duly surveyed and laid out on a registered plan into lots and streets and some lots had been sold by the then owners partly from the land now vested in the plaintiff, and partly from the land to the north of it. Subsequently the plaintiff repurchased the lots sold except those lying to the north and sought to restrain the defendants from opening up the streets through his lands, claiming that they were his private property :—*Held*, by Ferguson, J., that sec. 62 of R. S. O. ch. 152 is retrospective and applies to streets, etc., surveyed and laid out on plans made before the passing of the Act, and that the streets so laid out here were public highways; but that defendants not having passed a by-law to that effect, could not proceed to open them up.

On appeal to the Divisional Court, there being an equal division of opinion, except as to one of the streets, the appeal of the plaintiff was dismissed.

Acceptance by user and recall of dedication and consent by mortgagee discussed.

**Statement.**

THIS was an action tried before FERGUSON, J., at the Chancery Spring sittings of 1890.

The plaintiff, George Gooderham, claimed to be the owner in fee of certain land, which is described by metes and bounds in the judgment of Ferguson, J., and which he had leased to the plaintiff Stark.

The plaintiffs sought to obtain an injunction restraining the defendants from entering upon the property mentioned in the statement of claim; and also to have it declared that the defendants had no right or authority to open up certain streets to the south of Eastern Avenue, namely, Saulter street, Strange street, and D'arcy street, the name of the latter being subsequently changed to McGee street.

The learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts are fully stated :—

FERGUSON, J. :—

Judgment.

Ferguson, J.

The plaintiff Gooderham claims to be the owner in fee of a parcel of land in the city of Toronto, which in the statement of claim is described as being composed of that portion of lot No. 14, in the broken front of the township of York, lying south of South Park street or Eastern avenue, bounded on the east by the line dividing lot No. 13 from lot No. 14, in the said broken front, on the south by the boundary line established between the several owners of the broken front lots, and the grant by the Provincial Government to the corporation of the city of Toronto, and on the west by lands owned by one John Smith, and leased to Messrs. Gooderham & Worts (limited), save and except a small portion thereof, comprising about one-fifth of an acre, situated near the south-west corner of the said land owned by the said John Smith, but leased to the plaintiff Gooderham, for a period of forty-two years from the 22nd day of January, 1885. The land comprises one large field containing about twenty-two and a-half acres, and is fenced on all sides except the south where it abuts on Ashbridge's bay.

The interest of the plaintiff Stark is as lessee of all the land for a term of ten years for, as it is said, the purpose of using it as a ground for athletic sports, etc.; and he has expended considerable sums of money with this object, and entered into certain agreements and undertakings with others with the same view.

The defendants say that this parcel of land, together with other adjoining parcels, was at one time laid out into city lots and streets by the owners: that it was duly surveyed for this purpose: that a map or plan was made and registered shewing such lots and streets: and that lots were sold fronting upon these streets, or certain of them; and that for these reasons, amongst others, the places in which these streets were located became and are public streets or highways.

The defendants also contend that, even if such was not

Judgment. and is not the effect of these acts of the owners, and the  
Ferguson, J. registration of the map or plan with the sale of the lots as  
aforesaid, yet there was a dedication in fact by the respective owners of such streets as public highways; and that according to the principle or rule that a place being once a highway it is always a highway, the places of these streets are now respectively highways.

Such is an outline of the contentions of the parties with respect to the character or condition of, or perhaps more properly the title to, the lands embraced by the streets indicated upon the map or plan; but it is not to be understood that I have stated all their contentions in this respect in detail here, or endeavoured to do so.

This large field was, until the making of the lease of it to the plaintiff Stark, occupied by the plaintiff Gooderham as a pasture field for cattle, etc., and was continually fenced as such field (as shewn by the evidence) for a period of thirty years or more. It is still used by the plaintiff Gooderham, more or less, as I understand, for the purposes of pasture, so far as the same may not be inconsistent with the rights or convenience of the tenant Stark. I am not certain as to how this is, nor do I think it of any great materiality in the case.

The registered map or plan embraced lands lying north of south Park street or Eastern avenue. The streets in question here, being by name Saulter street, Strange street, and D'Arcy street, running north and south, or nearly so, passed directly through the lands above described and now claimed by the plaintiffs, and these lands lying north of Eastern avenue. Certain of the lots lying north of this avenue and fronting on these streets, were sold to persons who purchased them "according to the plan," by which is meant that they were in the conveyances described as lots by number upon the plan. These purchasers, or some of them, built upon their respective lots so purchased, and some of them are residing there. It also appears that on some (I think two) of these streets north of this avenue, what is called "public work" has been done; that is to say, there

has been some cedar block pavement laid down upon the frontage tax system, and some other work, the particulars of which I need not, I think, here detail. Judgment.  
Ferguson, J.

The Grand Trunk Railway passes on a curved line obliquely through this parcel of land lying north of Eastern avenue from the intersection of this avenue with Saulter street, or about this point, to or in the near neighbourhood of the intersection of D'Arcy street and Queen street; D'Arcy street being the most easterly and Saulter street being the most westerly of the three streets in question. This railway was in existence there when the plan was registered, and is shewn thereon. The buildings upon the lots and the improvements of the streets lying north of Eastern avenue are of comparatively recent date.

Certain of the owners and occupants of lots situate on these streets, or some of them, lying north of Eastern avenue, petitioned the defendants for the purpose of having these three streets opened up through the lands claimed by the plaintiffs from Eastern avenue southerly to the water's edge.

It may here be remarked that these streets do not appear upon the plan to extend to the water's edge, but only to a continuation of Front street in the city, laid down upon the plan as Front street; and it appears that there is some land between this continuation of Front street and the edge of the water; the water, however, in some places, approaching to or nearly to the south boundary of the street called on the map Front street.

To this petition the defendants gave ear, mainly however through a committee, and a conclusion was arrived at that the streets in question should be opened up according, as nearly as may have been, to the prayer of the petition; but no by-law was passed (nor as I understand any resolution of the council embracing what would naturally be the contents of such a by-law) on the subject.

Notice of the proceedings on the subject going on before the defendants' committee, was it is said, regularly and properly given to the plaintiff Stark; and there is evidence



Judgment.  
Ferguson, J.

in support of this having been done and of his attendance by himself or another before the committee. The plaintiff Gooderham says he was not notified of these proceedings ; and I do not think it appears that he was regularly and properly notified, or that he attended by himself or others at all the meetings of the committee for the purpose of shewing what his rights, according to his contention were, or of opposing the application made by the petitioners.

Pursuant to the conclusion arrived at upon the consideration of this petition instructions proceeding from the office of the defendants' engineer, were given to the defendants' proper officer in that behalf, to take or pull down or remove the plaintiffs' fences with the object of opening up these three streets from Eastern avenue to the water's edge.

Prior to this, as I understand, and on the 27th day of July, 1888, a notice signed by the defendants' solicitor and their engineer, both *quasi* permanent officials of the defendant corporation, was given to the plaintiffs.

This notice is as follows :

“ Take notice that the city of Toronto require you to remove the fence from and to open up for traffic the streets shown upon plan No. 105, and known as D'Arcy street, (now McGee street), Strange street and Saulter street, from South Park street to Front street ; and to remove all obstructions from said streets so that the same may be used by the public requiring access from Queen street to Front street, in the city of Toronto. If you fail to remove these obstructions, and to give us notice that the streets are open to the public within one month from this date, we shall advise the city to take such proceedings as may be necessary in the law to compel you to open the streets for public use.”

It is not complained that a sufficient time did not elapse after the giving of this notice before any further act of the defendants in the premises.

Pursuant to the instructions received as above, Mr. Jones, the defendants' street commissioner, made preparations to remove the plaintiffs' fences for the purpose of opening up these streets. He sent his foreman (and men, as I understand), pursuant to appointment at a point not far from the place, for this purpose.

In his evidence he says that a thought then occurred to him that he might not be able to find the proper lines of the streets, and he told the men to hold back till he could obtain information as to the proper lines ; that for this purpose he went to the city engineer's office and saw the city surveyor who said that he would " come " the next morning, and that he then instructed the men not to " go on," and that day-afterwards he heard of an order of the Court, and did no more.

There can be no doubt that, but for the order of the Court, the commissioner of streets and the surveyor of the defendants would have proceeded the following morning to remove the plaintiffs' fences for the purposes aforesaid.

This action is brought for the purpose of obtaining an injunction restraining the defendants, etc., from entering or trespassing upon the property above described, or interfering in anywise with the plaintiffs, or either of them, in the enjoyment of the same. Also to have it declared that the defendants acquired no right or authority to open up the streets in question laid down upon the said plan, by reason of the filing thereof: that the interests of the plaintiffs are in nowise affected by the filing of the plan ; and that no right exists, by reason of the filing thereof, to have the said streets opened up. They ask general relief and their costs.

The plaintiffs' pleadings are somewhat historical and voluminous. Their sufficiency for the purposes intended is not objected to, and I need not, I think, say more of this here.

There can be no doubt, I think, that the order spoken of by Mr. Jones, the defendants' commissioner, which caused him to refrain from taking down the plaintiffs' fences, was the order for the interim injunction obtained in this action by the plaintiffs.

At the trial the questions for determination were stated by counsel for each party to be two, and only two in number, that is to say: (1) Are the streets in question south of Eastern Avenue highways? and (2) If they are

Judgment.  
Ferguson, J.

Judgment. highways, was a by-law of the defendants necessary, under  
Ferguson, J. all the facts and circumstances that have been made to appear, to authorize them to open up such highways?

If they are not highways there is no pretence that the defendants are in the right. If they are highways, and no such by-law as aforesaid was necessary, then the defendants would seem to be in the right. If they are highways, and such a by-law was necessary, the defendants would still be in the wrong, but the plaintiffs' case would not possess that substantial character that they at present attribute to it.

Touching this last position the defendants have a very peculiar pleading of which I will possibly speak hereafter.

During the trial I found as a fact that the 16th paragraph of the plaintiffs' statement of claim alleging want of good faith on the part of the defendants in the action that they had taken respecting those alleged streets or highways was not proved; but on the contrary thereof was disproved.

I also found that before the commencement of the action the defendants did intend to remove the fences of the plaintiffs for the purposes before mentioned without passing any by-law in respect of the same, but expressed the opinion that this did not appear to be inconsistent with a change of intention on the part of the defendants after having received the statement of claim, and their being then of the mind stated in the third paragraph of their statement of defence.

For the purpose of avoiding the necessity of giving a large volume of evidence, counsel very properly, as it seems to me, admitted a series of facts, and signed and put in a paper of such admissions. These admissions are as follow :

"1. That the plaintiff Gooderham is, and those through whom he derived title by conveyances have been for the past twenty-five years, in occupation of part of the east half of lot No. 14 in the broken front concession of the township of York, bounded, on the east by the division line between lots Nos. 13 and 14 in the said township, on the south by the northern boundary line of the lands granted by the Crown to the defendants by patent, dated the 18th day of May, 1880, on the west by the lands owned by one John Smith and the Grand Trunk Railway Company, and on the north by the south limit of Eastern Avenue, formerly South Park street.

2. That the said lot comprises one large field containing about twenty-two and a-half acres, and fenced on the north, west, and east sides, and that such field has been so fenced for the last twenty-five years. Judgment.  
Ferguson, J.

3. That some time prior to the year 1854, James Boulton and Thomas Saulter, who were the owners of the east half of lot number 14, in said broken front concession, prepared a plan of such property, which is marked Exhibit A hereto.

4. The said plan was registered by the said Boulton and Saulter on or about the 26th day of December, 1854.

4a. At or about that time John Smith was the owner of the west half of said lot 14 in the broken front concession aforesaid, and that the land, which appears on said plan as Saulter street, was the easterly sixty-six feet of of the land then owned by the said John Smith.

5. That the plaintiff Gooderham is in possession of the land aforesaid—"by which no doubt is meant the field of twenty-two and one-half acres—

"under and by virtue of the conveyances set out and the possession of the former owners. The conveyances referred to are: Mortgage Thomas Saulter and James Boulton to Honourable H. J. Boulton, which was foreclosed. Deed—Hon. H. J. Boulton to Clarke Gamble, 16th March, 1865: Deed—Clarke Gamble *et ux* to George Leslie, November 23, 1882. Deed—George Leslie *et ux* to Edward Blong, March 13th, 1884. Deed—Edward Blong to George Gooderham, March 13th, 1884. And certified copies of conveyances were to be admitted.

6. The said Boulton, Saulter and Henry John Boulton, conveyed to the said John Smith certain lots shewn on said plan by deed marked Ex. B.

7. The plaintiff Gooderham has since by deed, dated 22nd January, 1885, acquired title to all the said lots, except lot 346, on said plan 105, and as to this lot he has a lease thereof from the said John Smith for a term of twenty-one years from the 22nd January, 1885, renewable for a further term of twenty-one years, as per an agreement of the 21st December, 1888.

8. The firm of Messrs. Gooderham & Worts (limited), of which the plaintiff Gooderham is a member, are also in possession of certain lands lying immediately west of Saulter street under a lease thereof from John Smith, the owner of said lands, which lease is marked Ex. C.

9. None of the said streets shewn on the said plan 105 have been established by by-law of the municipal corporation having jurisdiction in the premises, nor have been laid out on the ground or used by the public as streets."

I take this to refer to streets south of Eastern avenue.

"10. The owners of various lots on the north side of Eastern avenue claiming to have purchased according to the said plan 105, petitioned the defendants to have the said streets shewn on said plan opened up and made available for traffic."

*Signatures of Counsel.*

This plan 105 produced from the registry office appeared to have had some alterations made upon it, as to which



Judgment. remarks were made, but there was no evidence regarding these, and the plan must be taken, I think, as it now reads.

Ferguson, J.

As might readily be expected a very large number of statutes and authorities were referred to by counsel.

Section 62 of 50 Vic. ch. 25 (O). was much discussed.

The section is as follows :

“ All allowances for roads, streets or commons, surveyed in cities, towns and villages or any part thereof which have been or may be surveyed and laid out by companies and individuals and laid down on the plans thereof, and upon which lots of land fronting on or adjoining such allowance for roads, streets or commons, have been or may be sold to purchasers, shall be public highways, streets and commons; and all lines which have been or may be run, and the courses thereof given in the survey of such cities, towns and villages, or any part thereof, and laid down on the plans thereof, and all posts or monuments which have been or may be placed or planted in the first survey of such cities, towns and villages, or any part thereof, to designate or define any such allowances for roads, streets, lots or commons, shall be the true and unalterable lines and boundaries thereof respectively ; and all land surveyors employed to make surveys in such city, town or village, or any part thereof, shall follow and pursue the same rules and regulations in respect of such surveys as is by law required of them when employed to make surveys in townships: provided that the municipal corporation shall not be liable to keep in repair any road, street, bridge or highway, laid out by any private person until established by by-law of the corporation or otherwise assumed for public use by such corporation as provided in the Consolidated Municipal Act, 1883.”

In the case *Re Waldie and Corporation of Burlington*, 13 A. R. 104, secs. 82, 83, 84 and 85 of the Registry Act, R. S. O. ch. 111 (1877), and 525 and 527 of the Municipal Act, R. S. O. ch. 174 (1877), were considered ; and in one part of the judgment it is said, at p. 111 : “ Neither the mere marking out upon a plan of spaces for roads and

streets, nor the registration of such a plan, nor the sale of lots according to it, nor all of these acts combined, will constitute an absolute dedication of the places so marked down as public roads or highways. They may become so by any acts from which an irrevocable intention to dedicate them may be inferred, and by acceptance by the municipality, and then section 527 has its operation.”

Judgment.

Ferguson, J.

In that case it was not necessary to consider the effect of section 67 of the Act respecting land surveyors and the survey of lands, R. S. O. (1877) ch. 146, declaring, as it does, that “all allowances for roads, streets or commons which have been surveyed in such towns and villages and laid down upon the plans thereof, and upon which lots of land fronting on or adjoining such allowances for roads, streets or commons have been or may be sold to purchasers, shall be public highways, streets, and commons.” This section seems applicable to the survey of towns and villages, and not to such a survey as that in *Re Walkie and Corporation of Burlington*; and I think the Court must have so considered it, as no reference whatever is made to the section.

A number of authorities were referred to in support of the contention, that before an allowance for a road or street in a private survey could be a highway, it is necessary that this should be established by by-law, or otherwise assumed for public use by the municipal corporation; but, as I understand them, they are not authorities under statutory provisions such as those contained in the section 62 of 50 Vic. ch. 25.

This section seems to me to be new in character, and to possess a meaning which shows that there may exist in cities, towns, and villages respectively, public highways, streets and commons, which the municipal corporation is not liable to keep in repair before they are established by by-law or otherwise assumed for public use; and the provisions of it seem to apply to all allowances for roads, streets, or commons, which may have heretofore been, or which may hereafter be, surveyed and laid out \* \* and laid down upon plans \* \* and upon which lots fronting

Judgment. on \* \* have been sold ; and to provide that these shall  
 Ferguson, J. be public highways, streets and commons.

The Act 12 Vic. ch. 35, sec. 41, applying to surveys of towns and villages seems to be clearly retrospective. The same Act is found in the Con. Stat. Can. 1859, ch. 77, sec. 87, and in Con. Stat. U. C., ch. 93, sec. 35.

The first sub-sec. of sec. 82 of R. S. O. (1877) ch. 111 taken from 31 Vic. ch. 20, sec. 75, was repealed, and a new sub-section substituted by 50 Vic. ch. 8, *schedule*, the effect being, as it appears to me, to enlarge the provisions so that they do not apply solely to a survey or sub-division into "town or village lots;" and during the same session of Parliament the sec. 62 of 50 Vic. ch. 25 was passed.

The Act in force at the time the survey was made in the present case was 12 Vic. ch. 35. This was an Act to repeal certain Acts and to make better provision respecting the admission of land surveyors and the survey of lands.

The 42nd section provides, however, for the registration of plans ; and says that the plan shall be certified by a land surveyor and also by the owner. This seems to be for the purposes of registration ; and the enactment, as before indicated, seems to apply to the survey of towns and villages. The earliest form of certificate that I have noticed is form H. of the forms appended to 31 Vic. ch. 20 (O.).

Section 62 of 50 Vic. ch. 25 (O.), does not refer to registration of plans. The following section, 63, does ; but it seems to apply to cases where land is surveyed and sub-divided for the purpose of being sold, etc., in lots, by reference to a plan which has not already been registered. The provisions of the second sub-section of this section, providing for (amongst other things) the form of the surveyor's certificate of the plan have reference, I think, to plans made after the passing of the Act, and not to plans then already registered. These sections are now sections 62 and 63 of R. S. O., ch. 152 (1887).

As I have already said, I am of the opinion that the provisions of this section, 62, are retrospective. I think

the words employed too plain and explicit to admit of any Judgment.  
other conclusion. Ferguson, J.

A question then is : Do the streets in the present case fall under the description of roads or streets contained in the section ? There is evidence that a survey of the place was made, and there can be no doubt that such is the fact.

There can be no doubt that it was made by a land surveyor. I do not recollect that there was verbal evidence given that the late Mr. J. Stoughton Dennis was a surveyor. If such evidence were not given, and it is insisted on as an objection, I would be inclined to hear such evidence of it. It seemed to have been assumed that such was the fact. The land was laid out upon this survey, and the lots and allowances for these streets laid down upon a plan thereof and lots were sold fronting on and adjoining each of these allowances for streets ; and, according to the words of the section, these allowances for streets are public highways or streets ; and I think the provisions of the section had this effect.

I do not think this is met by the argument based, or at all events partially based, upon the case *Re Morton and Corporation of St. Thomas*, 6 A. R. 323, at p. 329, where Mr. Justice Burton in the course of delivering his judgment said : “ Does it not follow that the owner might, therefore, under such circumstance by a repurchase of all the lots sold, at all events before any actual use of the land, reinvest himself with the same rights and dominion over the property which he had before the sale ? ”—for, in the present case, there has not been a repurchase of all the lots. On the contrary of this the lots embracing about one-half of the survey (as I understand the whole of it lying north of Eastern avenue) have not, nor has any of them, been so repurchased.

What the plaintiffs say amounts only to this, that there was a repurchase of the lots in a certain block of the survey, that lying south of this avenue, and that as to this block they are to be considered as having repurchased all the lots. I am not aware of any authority, and



Judgment. I think none was referred to, going to shew that the plaintiffs can or could succeed on this contention.

Ferguson, J.

But there is still another fact, which is this, there is one lot lying south of this avenue and fronting on the allowance for Saulter street, in which Mr. Smith has a reversion; and, in giving his evidence he said that he desired to have these streets opened. This lot has not been repurchased; and for these reasons I do not think the language of Mr. Justice Burton above referred to applies to the case. I cannot think that, assuming what that learned Judge said to be clear law, it shews that the original owner may repurchase all the lots in a portion only of the survey and reinvest himself with the same rights and dominion over the allowances for roads and streets in this portion that he had before the sale.

It was said in argument that the plan in this case had not the proper certificate of the surveyor. It seems to me, however, to have upon it such certificates as were required by the law at the time it was made for the purpose of registering plans that could properly be registered at the time; and, so far as I can see, the only objection to the registration of it is that the lands were in a city and not lands forming the site of any town or village, and the lots indicated by the survey not being town or village lots. The plan was, however, in fact registered as plan No. 105 in the registry office, as long ago as the year 1854, and during the period that has since elapsed a very large number of purchases and sales, and conveyances of lots according to it, and referring to it as plan No. 105, have taken place, and the plaintiffs and those through whom they claim have on very many occasions been parties to such conveyances.

The evidence shews that a very large number of plans, representing very valuable property, no doubt, are in the same position as is this plan; and, looking at the provisions of these sections, 62 and 63, I am of the opinion that I will not be going too far in saying that the legislature when they used, in section 63, the words "by reference to a plan which has not been already registered," may

be taken to have intended that plans in the position of this plan 105 were to be considered as plans that had been already registered. I don't see how otherwise their manifest idea or scheme could be practically worked out. Judgment.  
Ferguson, J.

It was said that the plan was not proved. The original plan was produced. There was no denial or dispute as to the signatures of the owners or the surveyor, and there was the evidence, that I have before referred to, as to the survey having been in fact made. I think the plan was sufficiently proved as against the plaintiffs, at all events.

Section 62 makes its declaration or enactment without any reference to the registration of a plan; and I am of the opinion that it in effect declares that the allowances for streets in the present instance are highways; and I think that those allowances for streets, although they have not, nor has any of them ever been used as such, have been shewn to be and are highways.

There was a contention that, even if a conclusion such as the one I have arrived at were not the proper conclusion under the statutes, yet that the evidence shewed that these allowances for streets were and are highways by reason of dedication by the owners of the soil and acceptance by or on behalf of the public—that is to say, the municipal corporation. In this contention many conveyances—those mentioned in the paper of admissions, to which I have before alluded—and many facts were relied on; but being of the opinion that I have already expressed, I think I am not called upon to go through these matters here and decide in respect of this contention.

Then assuming that these allowances for streets are highways, another question is to be considered, which is: Were the defendants, the corporation of the city, right in attempting to open them up, as they no doubt at the beginning threatened and intended to do, without having passed a by-law on the subject?

On this question I have perused all the authorities I have been able to find, amongst the others, the cases of *Yeomans v. Corporation of Wellington*, 4 A. R. 301, and

Judgment. and *Pratt v. Corporation of Stratford*, 16 A.R. 5, and I am  
Ferguson, J. willing to say that I have not found anything that enables  
me to state any rule upon the subject. Counsel, though  
amongst the ablest at the bar, were unable to afford me  
any certain guide, and in all candor did not profess so to  
do. Under such circumstances, I can only offer my opinion  
derived from such light as I have been able to obtain from  
decided cases and a perusal of the provisions of the Municipal  
Act bearing upon the matter of by-laws. This  
opinion is, that a by-law was necessary before the defendants  
could properly do as they were threatening and  
intending to do, and that in this respect they were in the  
wrong.

A somewhat curious pleading of the defendants is contained in the third paragraph of their defence, in which they deny that they intend to open, or to accept the streets in question, or any of them as public highways, or to remove any obstructions therefrom, unless and until they shall have passed a by-law under the provisions of the Municipal Act and amending Acts for the opening and acceptance of the said streets as public highways.

That the defendants at the time this action was commenced did intend to proceed without having passed such a by-law is, as I have said, beyond all doubt. The object of this pleading, so far as I can see, is to affect the matter of the costs of the action, but I do not perceive how it can have this effect.

If I am right in respect of the necessity of such a by-law, the defendants were threatening and intending to remove the plaintiffs' fences without being properly authorized so to do, and were thus in the wrong. The plaintiffs brought the action to obtain an injunction. If the defendants were of the opinion that a by-law was necessary as the pleading taken by itself would seem to indicate, they could have submitted for the time being. Instead of doing this they defend the action. They may have had their own motives or objects for so doing; but in respect to costs I think they are in the position of any other

defendants in an action who are found to be in the wrong, Judgment. for they had not at the time the right to do that which they Ferguson, J. threatened and intended to do.

I think the defendants should be restrained from entering or trespassing upon the property or interfering with the plaintiffs in the enjoyment of the same until further orders, and that the defendants shall pay the plaintiffs' costs of the action.

*The judgment will be accordingly.*

In Easter Sittings, 1890, a motion was made on behalf of the plaintiffs to set aside the judgment entered for the defendants, and to enter the judgment for the plaintiffs.

In Michaelmas Sittings, November 17, 1890, *Moss, Q.C.*, and *T. P. Galt*, supported the motion. There are two points raised by the plaintiff; 1st, that the lands in question are not highways; and 2nd, that even if they are highways they cannot be opened up without a by-law passed for such purpose. The learned Judge at the hearing decided the latter point in the plaintiffs favor, and this has not been moved against by the defendants, and therefore the only question for the Court now is the first one. The learned Judge held that by virtue of R. S. O. (1887) ch. 152, sec. 62, the lands in question were highways. This section was consolidated from sec. 62 of 50 Vic. ch. 25 (O.) passed in 1885. The section in force previous to this only applied to towns and villages, and not to cities, and this was the section in force in 1854, when the plan was filed. It would be most unreasonable to hold that an Act passed in 1885 is to affect land the plan as to which was filed some thirty years before, and as to which the statute then in force had no application. The effect of the defendants' contention is to place a meaning on the plan which the parties filing it never contemplated. The statute has no such retroactive effect: An Act of Parliament is not to be construed as retrospective by inference, but only by express



## Argument.

enactment: *Wright v. Hale*, 6 H. & N. 227; *Moon v. Durden*, 2 Ex. 22; *Evans v. Williams*, 2 Dr. & Sm. 324, 329; *Martindale v. Clarkson*, 6 A.R. 1; *Gardner v. Lucas*, 3 App. Cas. 582. The defendants contend that the construction given to the prior section, applicable to towns and villages bears out their intention, and they refer to *Re Waldie and Corporation of Burlington*, 13 A. R. 104, 7 O. R. 192; *Re Morton and Corporation of St. Thomas*, 6 A. R. 323, but the language of the learned Judges in these cases does not assist the defendants but is rather in the plaintiffs' favour. See *Hislop v. Township of McGillivray*, 12 O. R. 749, 15 A. R. 687; *Shoebrink v. Canada Atlantic R. W. Co.*, 16 O. R. 515. But apart from this, the Act has not the meaning intended for it. Its object was merely for the guidance of surveyors when called on to lay out lots, and this they would do subject to the rights of persons in the lands. The plaintiff Gooderham has acquired all the lots in this block, so as to vest in him all the rights the owners had before the filing of the plan. The learned Judge seemed to think that there was one lot not acquired by Gooderham, but Gooderham has a lease of it from Smith; and further Smith's interest is only that of a private person and not that of the public. Dedication may be recalled; and assuming that there even was dedication, what took place amounted to a recalling or abandonment of such dedication: *Cubitt v. Lady Caroline Maxse*, L. R. 8 C. P. 704.

*Robinson, Q. C., and C. R. W. Biggar, Q. C., contra.* There is no question but that the plaintiffs have always recognized the plan and the streets laid down on it; has accepted title to the lands according to the plan, and conveyed according to it. Dedication is always one of intention; and there is clear evidence of dedication here. There is the filing of the plan, laying out of the streets, and the actual opening up of the portions north of Eastern Avenue. Acceptance by the public of the portions of the streets north of South Park street (now Eastern Avenue) was an acceptance of the whole. The parties purchased lots north of

South Park street according to the plan, and with the idea Argument. that the streets would be extended to the water front. There is nothing opposed to dedication except the fact of the property being fenced in, but this does not constitute revocation. The American cases clearly shew a dedication: *Elliott on Roads and Streets*, pp. 89-90; *Shea v. City of Ottumwa*, 67 Iowa 39; *Meier v. Portland, etc., R. W. Co.*, 19 Pacific Reporter 610; *Town of Derby v. Alling*, 40 Conn. 410. The fact of the corporation not having opened up these portions of the streets and kept them in repair, is not evidence of intention not to accept or a refusal to accept a dedication. It would be against reason in a new country like this to require streets to be opened up before they are required: *Trustees of M. E. Church Hoboken v. Council of Hoboken*, 33 New Jersey L. R. 13, 18; *City of Indianapolis v. Kingsbury*, 101 Ind. 200, 212.

By sub-sec. 2 of sec. 531, of the Municipal Act, R. S. O. (1887) 184, the liability of the corporation to keep streets etc., in repair does not arise "until established by by-law of the corporation or otherwise assumed for public use by such corporation."

The interpretation given to sec. 62 of R. S. O. ch. 152, by the learned Judge is the correct one. The Act is clearly retrospective. The section cannot be given the limited construction contended for by the plaintiff, namely, that it was merely intended to guide surveyors. The wording of the Act is most general in its terms, and applies to everybody.

March 6, 1891. GALT, C. J.:—

At the trial certain admissions were made. By admission No. 3: "That sometime prior to the year 1854 James Boulton and Thomas Saulter, who were the owners of the east one-half of lot No. 14 in the broken front of the concession, prepared a plan of such property, which is marked Ex. A hereto: that the said plan was registered by the said

Judgment. Boulton and Saulter on or about the 26th day of August, 1854.”  
Galt, C.J.

In this admission there is a mistake. Boulton and Saulter were not the owners of the land, but were mortgagors. They had purchased the land from the late Henry John Boulton on the 1st July, 1853, and had given a mortgage bearing date the same day. They did file what purported to be a plan of the land in question, dated the 9th August, 1854. This mortgage was subsequently foreclosed by a decree made on the 29th day of August, 1861.

The learned Judge gave judgment in favour of the plaintiffs, holding that, “Before the defendants were at liberty to open up the said streets it was necessary that a by-law should be passed.”

The present motion is by way of appeal, alleging that the finding that the plaintiffs were not entitled to a perpetual injunction is contrary to the law and evidence, and alleging that the streets in question in this action are not highways but are the property of the plaintiffs.

There are two questions arising on this present motion. The first is with regard to Saulter street. This street was originally dedicated by Smith, who was the owner of the west one-half of lot 14 and also the owner of lot 15, which land is at present enclosed in a fence erected by the plaintiff, and was at one time included in a lease made by John Smith to Gooderham & Worts on the 17th July, 1865; but that lease was surrendered by the lessees on the 6th February, 1883, and a new lease was granted which from its description did not include Saulter street, because by the description the land is bounded by the westerly limit of Saulter street. Therefore, so far as that street is concerned, this appeal must be dismissed.

Then as regards the other streets. As I have already stated, at the time when the plan was registered Boulton and Saulter were mortgagors; and it is perfectly plain that the mortgagor, without the assent of his mortgagee, can make no dedication of a right of way to the public.

In *Ward v. Davis*, 3 Sandford's Superior Court Reports,

N. Y., p. 502, 513, the learned Judge in giving the judgment of the Court lays down the law as follows: "It is needless to cite the authorities to prove that an absolute and final dedication of lands to a public use, can only be made by the owner of an absolute fee. It is a self-evident truth that he only can devote his real estate in perpetuity to the use of the public, who is competent to convey a fee by a perfect and unencumbered title to an individual."

Judgment.  
Galt, C.J.

That was a case of peculiar hardship, so much so that in giving judgment the Court said, at p. 521: "We indulge a confident hope that the claims of innocent and deceived purchasers will be fairly considered, and, in the result, their reasonable expectations substantially be fulfilled."

The next case to which I will refer is the case of *McShane v. City of Moberly*, reported in 79 Miss. 41, in which it was held that the owner of land subject to a mortgage had no power to dedicate streets to the public.

The same doctrine is affirmed in *Hoole v. Attorney-General*, 22 Ala. 190.

See also *Bushnell v. Scott*, 21 Wis. 457, which was also a case of the dedication of a road in which the Court state, at p. 462: "That no one but the owner, or his duly authorized agent, can dedicate property to the public use, is a proposition too clear to require the citation of authorities in its support. The idea of dedication involves, of necessity, an act of the owner indicating an intention to part with the exclusive dominion and enjoyment of his land, and to abandon or devote it to some public use."

From these authorities it is manifest that at the time that Boulton and Saulter filed the plan in question they had no authority to dedicate the streets now in question to the public.

But it was asserted on behalf of the city that the right of dedication was recognized by the late Henry John Boulton. Under the terms of a deed, dated 5th May, 1885, and made between Boulton and Saulter of the first part, the Hon. Henry John Boulton of the same place of the second part, Mrs. Boulton, etc., of the third



Judgment.

Galt, C.J.

part, and John Smith of the fourth part, whereby in consideration of the said Smith having dedicated to the public a street sixty-six feet wide as the same is laid down in a plan of a survey of all that piece or parcel of land formerly known as lot No. 14 in the broken front of the township of York, owned by the said John Smith, James Boulton and Thomas Saulter, they the parties of the first part, the said Boulton and Saulter, did grant to the said Smith certain parcels or tracts of land and premises situate, lying and being in the city of Toronto aforesaid, being composed of certain lots marked and laid down on the plan thereof, duly registered in the registry office for the county of York, which said sale was by the said deed confirmed by the said Henry John Boulton. This is the recognition of the said plan relied on by the defendants as recognizing a dedication to the public of Strange street and McGee street. The street therein mentioned is Saulter street, to which I have already referred.

There is no street referred to in said deed in reference to the lot; but, on referring to the plan, some of those lots which were subsequently purchased from Mr. Smith by the plaintiffs, are included in the land in question. After the decree of foreclosure had been made, a conveyance was executed by the late Mr. Boulton to Clarke Gamble, whereby he conveyed to the said Gamble all that certain parcel or tract of land and premises situate, lying, and being in the township of York, in the county of York and province aforesaid, being composed of the east one-half of the broken front of lot No. 14, in the first concession of the said township of York, containing thirty-five acres of land. The description then proceeds: "And subdivided into town lots according to a plan showing the numbers thereof," excepting only those lots which had been conveyed to Smith.

It will be seen from this description that the land is conveyed to Gamble, not as defined by the plan but generally, and states only that the land had been sub-divided.

It, therefore, appears to me that, so far as the streets

now in question are concerned, namely, Strange street and McGee street, the land was absolutely conveyed to Mr. Gamble. In 1870, Mr. Gamble conveyed to Mr. Leslie "All and singular that certain parcel or tract of land and premises," etc., being composed of the east one-half of the broken front of lot 14 in the first concession of the said township, containing thirty-five acres of land. This deed also refers to the fact that the land had been sub-divided into town lots according to a plan, but makes no reference to any streets. On the 13th March, 1884, George Leslie conveyed to one Edward Blong, a certain portion of the said land which was described as follows: "Lying and being in the city of Toronto, and being composed of a part of broken front lot 14, in front of the 1st concession from the bay, formerly in the township and now in the city of Toronto, and may be more particularly described as follows: "Commencing at the intersection of the south side of South Park street," etc. It then gives the description by measurement, and no reference whatever is made to any intersection by the limits of Strange street, or McGee street. It is true that the deed refers to a number of lots which are on the plan, but there is no reference to any streets. Then on the 13th March, 1884, Blong conveys to Gooderham the said land by a similar description. This is the property now held by the plaintiff Gooderham.

Judgment.  
Galt, C.J.

At the time when the case was tried before my brother Ferguson, no reference was made to the fact that Boulton and Saulter were mortgagors of the property. It was tried before him on the basis of the admission to which I have referred. Consequently my learned brother was not called upon nor did he express any opinion except as to the one question—namely, whether or not the city of Toronto had a right to open up the three streets now in question, without the passage of a by-law.

There never has been, so far as I can see, any reference to either Strange street or McGee street, in any conveyance; and it appears to me from the authorities which I have already cited, that there never was a valid dedication.

Judgment. by the owner of the fee of these streets south of Eastern  
Galt, C.J. avenue or either of them.

Consequently the plaintiffs are entitled to succeed on this application as respects McGee street and Strange streets; but as regards Saulter street, as I have already stated, the plaintiffs cannot contend that street was ever the property of Henry John Boulton under whom they claim.

ROSE, J. :—

The first question for consideration is whether the streets in question were, at the time of the trespasses complained of, public highways.

In *Cubitt v. Lady Caroline Maxse*, L. R. 8 C. P. 704, at p. 714, Brett, J., said: "According to the authorities collected in the notes to *Dovaston v. Payne*, 2 Sm. L. C., 6th ed., at p. 140, it seems that there are two ways by which a highway may be created. One is by dedication \* \* That a mere dedication by the owner of the soil will not create a highway is clear."

Blackburn, J., in delivering the judgment of the Court of Queen's Bench in *Fisher v. Prowse*, 2 B. & S. 770, at p. 780, says: "It is, of course, not obligatory on the owner of the land to dedicate the use of it as a highway to the public."

It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. Acceptance by the public is ordinarily proved by user by the public, and user by the public is also evidence of dedication by the owner. Both dedication by the owner and user by the public must concur to create the road otherwise than by statute. The other way in which a road may be created is by statute.

In *Re Waldie and Corporation of Burlington*, 13 A. R. 104, at p. 111, Osler, J. A., says: "Neither the mere marking out upon a plan, of spaces for roads and streets, nor the registration of such a plan, nor the sale of lots according to it,

nor all of these acts combined, will constitute an absolute dedication of the places so marked down as public roads or highways. They may become so by any acts from which the irrevocable intention to dedicate them may be inferred, and by acceptance by the municipality, and then section 527 has its operation.”

Judgment.

Rose, J.

Section 527 of R. S. O. (1877) ch. 174 provides that “every public road, street, or bridge, or other highway shall be vested in the municipality, subject to any rights in the soil which the individual who laid out the road, street,” etc., reserved therein.

The learned Judge continued: “But until they do become so,” (that is become public roads or highways) “section 84 expressly provides that a plan, although filed is not binding, and though sales may have been made under it, is only binding *sub modo*, that is to say, to the extent that the Court or judge may think proper not to permit a proposed amendment.”

In Elliott on Roads and Streets, p. 85 it is said: “Dedication is the setting apart of land for the public use. It is essential to every valid dedication that it should conclude the owner, and that, as against the public, it should be accepted by the proper local authorities or by general public user. As will be more fully shewn hereafter, it is not necessary that the act of the owner should be evidenced in any formal mode, nor that the acceptance of the public should be evidenced by a formal act.”

In this connection *Hubert v. Township of Yarmouth*, 18 O. R. 458, may be referred to, also the *Corporation of St. Vincent v. Greenfield*, 12 O. R. 297, 15 A. R. 567, 570.

In order therefore to find that the streets in question were and are public highways it is necessary to find that there was an intention on the part of the owners of the land to dedicate, *i. e.*, an *animus dedicandi*, and an acceptance of such dedication by the municipality.

The facts as to these questions are comparatively simple, and may be briefly stated. In 1854 the land in question was owned by James Boulton and Thomas Saulter, subject



Judgment. to a mortgage to the Hon. Henry John Boulton. On the  
Rose, J. 9th of August, 1854, Boulton and Saulter, caused a plan  
of the land to be prepared. This plan was subsequently,  
and in the same year, lodged in the Registry Office  
of the city of Toronto. The certificate signed by Boul-  
ton and Saulter, was as follows: "We hereby certify  
that this plan accurately exhibits the manner in which  
we have laid out and appropriated the lots and streets  
on that certain portion of lot 14, consisting of the  
three easterly ranges of lots east of Saulter street and  
comprising from lots 136 to 382 inclusive." These three  
easterly ranges of lots were divided by Strange and D'Arcy  
streets, and, as the certificate indicates, Saulter street lay  
immediately to the west of the westerly range. Saulter  
street was shown upon the plan, but the land laid out as  
Saulter street did not belong to Messrs. Boulton and Saul-  
ter, but to one John Smith. Smith, as it appears, agreed  
with Boulton and Saulter to dedicate to the public the  
land upon which Saulter street is laid out in exchange  
for ten lots upon the plan in question. By deed, bearing  
date the 5th May, 1855, made between the said James  
Boulton and Thomas Saulter of the first part, the said  
Hon. Henry John Boulton of the second part, and the said  
John Smith of the fourth part, it was recited that the  
parties of the first part for "and in consideration of the  
said John Smith having dedicated to the public, and for  
the benefit of the said parties of the first part, a street sixty-  
six feet wide, as the same is laid down in the plan of the  
survey, all that piece or parcel of land formerly known as  
lot No. 14. . . . and owned by the said John Smith,  
James Boulton and Thomas Saulter, such street extending  
from the Kingston road to the south side on Front street  
east . . . the parties of the first part grant to the  
parties of the fourth part ten lots," naming them "accord-  
ing to the plan." The said Hon. Henry John Boulton  
joined in the said deed for the purpose of confirmation.  
The lots conveyed to Smith were some of them north and  
some of them south of South Park street, now called

Eastern Avenue. The Hon. Mr. Boulton in 1861 fore- Judgment.  
closed the mortgage, and in November, 1863 obtained a  
vesting order in which the mortgage premises are described  
as "sub-divided into town lots according to a plan,  
showing the numbers thereof, lodged with the registrar of  
the county of York," save and except certain lots, including  
amongst others, the lots conveyed to the said John Smith;  
and thereafter the said the Hon. Henry John Boulton con-  
veyed the property by description according to said plan.

Rose, J.

It seems to me that the acts of the Hon. Mr. Boulton, above set out, clearly shew an assent on his part binding him as mortgagee, and subsequently as owner, by the plan filed by Boulton and Saulter. I conclude as a fact, on the evidence, that the making and filing of the plan and the agreement with Smith, for the purpose of completing the scheme, were with the knowledge and assent of the mortgagee; and thus he adopted the plan and became bound thereby as if he had himself made and filed it as owner of the land.

See Elliott on Roads and Streets, p. 106. *Vreeland v. Torrey*, 34 N. J. Eq. 312; *Wright v. Tukey*, 3 Cush. 290; *Hoole v. Attorney-General*, 22 Ala. 190; Angell on Compensation sec. 134; *McShane v. City of Moberly*, 79 Miss. 41; *City of Detroit v. Detroit and Milwaukee R. W. Co.*, 23 Mich. 173; *Smith v. Lock*, 18 Mich. 56.

The lots north of South Park street or Eastern avenue, or some of them, were sold and conveyed to purchasers and occupied, and the streets north of South Park street, including Saulter street, as I understand it, were opened out upon the ground and work done upon them, and as to such parts of such streets no question has arisen, it being conceded that there was not only intention to dedicate, but that there was a dedication in fact, and acceptance by the corporation by user.

The question has arisen as to the portions of the streets south of South Park street. For some fifteen or sixteen years the land lying south of South Park street was, I believe, lying in common unoccupied, when it was fenced in

Judgment. and has since remained fenced in and in possession of the  
Rose, J. plaintiffs or those through whom the plaintiffs claim.

It is contended on the part of the plaintiffs that there never was any acceptance in fact of the portions of the street lying south of South Park street; and that, if there ever was any intention to dedicate such portions of such streets there was a revocation of such intention when the land was fenced in and used as farm property.

I think it is manifest that there was an intention to dedicate, and unless the non-user of such portions of the streets, for the time which has elapsed since the filing of the plan and the sale of the lots is evidence which should be acted upon as a refusal to accept the dedication or as a recall of such dedication, then the act of the corporation which has been complained of is evidence of an acceptance on the part of the public of the streets so dedicated.

In Elliott on Roads and Streets, at p. 89, it is laid down that "An owner who makes a plat on which spaces are left indicating the dedication of roads or streets, and sells lots with reference to the plat cannot recall his dedication, for he leaves the streets to be opened by the proper local authorities at such a time as the public interest may require, and of this the local authorities are the judges. It is for them to determine when the public interests demand that the ways as laid out on the plat shall be taken in charge and improved for public use, but the ways as to those who have purchased lots exist from the time of their purchase. While it is true that a dedication must be accepted within a reasonable time, in order to secure the public right, the sale of lots with reference to the plat fixes the private rights of purchasers. What is a reasonable time depends on circumstances, as, for instance, where lots are platted near a town the implication is that when the corporate limits are extended, and the ways are required for the public, the town officers may accept the dedication."

The same learned author, at p. 113, says, "The owner may, as a rule, recall his dedication at any time before it has been accepted. Until there has been an acceptance the

public cannot be charged with the duty of repairing, nor is there any liability for injuries caused by the defective or unsafe condition of the way." Judgment,  
Rose, J.

The learned author is here speaking of the rights and duties of the public.

In *Shea v. The City of Ottumwa*, 67 Iowa, at p. 41, it is said: "It would not do to hold that city streets, dedicated to the public over hilly, rough land would revert to the dedicator if they were not improved and used by the public until the wants of the public travel demand it. In some of the cities of this State there are streets in some of the valleys thereof over which no vehicle or even horseman has passed, and yet they were dedicated more than thirty years ago. They have not been used for the reason that, until graded, they are incapable of use. The dedicator will be presumed by the law to have contemplated this state of things, and imposed no condition upon the public to use the street until the public wants demanded and secured their improvement."

In *The Town of Derby v. Alling*, 40 Conn. 410, at p. 435, Seymour, C. J., said: "Courts have sometimes said that a contemplated dedication is naught; that dedications are to take effect *in presenti* and must be accepted before they become binding. Where, however, a paper city is laid out as an entire thing the dedication of all the streets to the public is entire, and when the public act upon such dedication, the acceptance of part may and in general will be construed as an acceptance of the whole as an entirety. The public enter upon a part in the name of the whole, to enjoy the parts as from time to time such enjoyment of them becomes necessary. This is carrying into effect the manifest intention of the grantor, and of those for whose benefit the grant is made, and we see no difficulty in allowing this intent to prevail and to call it a dedication *in presenti*, to be carried into effect *in futuro*."

And on page 436: "There is no Statute of Limitations which as such is applicable to the case. The public could



Judgment. not be technically disseized, but public as well as private  
Rose, J. rights may be lost by unreasonable delay in asserting them. They may also be lost by an abandonment of them by those interested in their enforcement. Such abandonment may be inferred from circumstances or may be presumed from long continued neglect. The principal difficulty in this particular case lies in fixing the point of time when, under all the circumstances, the public authorities were properly called on to extend Third street to the River road, over the premises in dispute; until that time no laches are chargeable to anyone; until that time mere possession by the respondents would not be adverse to the public rights."

See also *Mcier v. Portland, etc., R. W. Co.*, 19 Pacific Reporter 610, and *City of Indianapolis v. Kingsbury*, 101 Ind., 200, at p. 212; *Trustees of M. E. Church of Hoboken v. Council of Hoboken*, 13 N. J. L. R. 13, 18; Angell on Highways, 3rd ed., p. 157, sec. 142, etc. At page 157, sec. 142, the learned author says: "The vital principle of dedication is the intention to dedicate—the *animus dedicandi*; and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made."

I have quoted largely from the American authorities; first because no other authorities were cited to us which are so nearly in point; and secondly, because, if I may venture to say so, they seem to me to be founded upon common sense, and, in the absence of authority to the contrary, I am prepared to adopt the reasoning there found, and to act upon it.

As to Saulter street, it seems to me the case is beyond question. Smith intended to dedicate Saulter street. The recital in the deed to him, to which I have referred, is clear and satisfactory evidence of the intention and of the consideration moving him; and, in addition, he petitioned the corporation to have the street opened up, and appeared as a witness at the trial before my learned brother Ferguson, and expressed his desire that the street should be opened up. The title to the land has never

passed out of him, but the easement created over it he has dedicated to the public. He has not recalled his dedication—does not recall it; does not now desire to recall it—and I cannot see how it lies in the plaintiffs' power to take from the public or from him, that which years ago he gave to the public, and which he now desires the public to enjoy. It would be against the interests of the public and the interests of Mr. Smith, and contrary I think to the fact, for the Court to hold either that there never had been any intention to dedicate, or any change of intention, or any recall of the dedication.

Judgment.

Rose, J.

I think, therefore, that the corporation, apart from any question of having accepted the whole by having accepted a part, is now in a position to accept the dedication of Saulter street south of South Park street; and that the plaintiffs have no right to interfere.

But I am further of the opinion that the intention to dedicate D'Arcy street and Strange street in their entirety from Queen street south to Front street, was manifested by the preparation and filing of the plan, and selling lots according to it, and subsequent conveyances to date, recognizing the plan.

The fact that the public did not need to use the streets until recently, and so permitted the plaintiff to fence them in with other land, and to have the use and enjoyment of them, does not, I think, entitle the plaintiff to say that there never was an intention to accept, or that there was in fact a refusal to accept; and does not, in my opinion, furnish any evidence of recall of the dedication, which, as far as Messrs. Boulton and Saulter were concerned, was complete at the time that the public took possession of the streets to the north of South Park street, and so indicated an intention to accept the dedication according to the plan of the whole.

The language of Mr. Justice Gwynne, in *Regina v. Donaldson*, 24 C. P. 148, at p. 156, is, I think, apposite: "The non-user by the public at the place obstructed by reason of the obstruction, cannot be called in aid by the per-

Judgment.

Rose, J.

son causing the obstruction, for the purpose of shewing that, at the place obstructed, there was no evidence of dedication by the original proprietor."

I am of the opinion that an acceptance of part was an acceptance of the whole, and that the public had the right to go on and open out the streets as and when the necessity for opening them out arose. Having regard to the nature of the soil and the growth of the city, it seems to me that it would be contrary to principles of common sense to hold that the duty lay upon the public to at once open out the streets and incur liabilities in respect thereof when the streets were not needed and when the opening out of them and the subsequent work upon them would have been an unnecessary and useless burden.

I am therefore prepared to hold, and do hold as a matter of fact and a matter of law, that the streets in question were dedicated to the public, and that within a reasonable time after the intention to dedicate was made manifest, the public accepted the dedication by user: that there never was any refusal on the part of the public to accept the dedication of any portion of the streets offered to the public, and that there never has been in fact any recall of the dedication; and that the streets dedicated, thereby became and are public highways.

I agree with Mr. Robinson in his argument that by sub-section 2 of section 531 of the Municipal Act R. S. O. (1887), ch. 184, it is made to appear that the liability of the corporation to keep streets, etc., in repair, does not arise "until established by by-law of the corporation *or otherwise assumed for public user by such corporation*," and therefore that the liability of a city to keep the streets in repair would only arise upon the actual user of such streets if not established by by-law.

I agree also to the construction of sec. 62 of R. S. O., (1887) ch. 152, by my learned brother Ferguson as being retrospective. It seems to me abundantly clear that the language of the section is capable of one construction only; and I further agree with my learned brother that the plans

referred to by sec. 63 are those to be filed after the coming in force of sec. 62 of 50 Vict. ch. 25.

Judgment.

Rose, J.

I think we cannot interfere with the finding of fact, that the streets were "laid out," for Messrs. Boulton and Saulter declared by their certificate written on the plan that they had been laid out; and Mr. Smith at the trial said that the whole plot was surveyed and staked out. So that, whether "laid out" means laid out on the plan or ground, the statute has in that respect been complied with.

The effect is, therefore, that both by dedication and acceptance, and by the force of the statute, the streets in question were, at the time of the trespasses complained of, and are, public highways. My learned brother Ferguson seems to have fallen into an error of fact as to the case of *Re Waldie and Corporation of Burlington*, 13 A. R. 104, in overlooking the fact that Burlington was a village.

There was no appeal by the defendant corporation against the order of my learned brother; and, therefore, although the question of costs of the action was mentioned, counsel agreed that we could not consider the propriety of the order in that respect.

If I am correct in the opinion which I have formed as to the dedication and acceptance, I do not see very clearly the necessity for a by-law to enable the corporation to open up the streets. I do not desire to express any opinion contrary to that formed by my learned brother, especially as the point was not argued before us, the corporation being willing to pass a by-law; but I desire to keep the question open for further consideration should it ever arise.

In my opinion the motion fails, and must be dismissed with costs.

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## [QUEEN'S BENCH DIVISION.]

## UNION BANK V. NEVILLE.

*Constitutional law—Assignments and Preferences—R. S. O. ch. 124, s. 9—  
Ultra vires—Bankruptcy and Insolvency.*

Section 9 of the "Assignments and Preferences Act," R. S. O. ch. 124, which provides that an assignment for the general benefit of creditors under that Act shall take precedence of all judgments and of all executions not completely executed by payment, etc., is a provision relating to bankruptcy and insolvency, and therefore *ultra vires* of a Provincial legislature, by sub-sec. 21 of sec. 91 of the B. N. A. Act.

## Statement.

AN interpleader application by the sheriff of Carleton, who had seized, under a *fi. fa.* issued by the plaintiffs against the goods of the defendant, goods which were claimed by the Banque Nationale and Nicholas Turner, and subsequently by Moran, the assignee of the defendant under an assignment for the general benefit of creditors, made pursuant to R. S. O. ch. 124.

All the facts are stated in the judgment of the Master in Chambers, before whom the application was argued on the 3rd March, 1891.

*Middleton*, for the sheriff.

*W. R. Meredith*, Q. C., for the plaintiff.

*Beck*, for Turner and Moran.

*Kelly*, for the Banque Nationale.

March 13, 1891. MR. DALTON, Q. C., MASTER IN CHAMBERS :—

An interpleader has arisen out of this case. The plaintiffs in February last seized goods of the defendant for a judgment debt \$5,247.39 and interest and costs; that was on the 3rd February; and on the 5th February made a further seizure of goods of the defendant, to the value of \$475.

Upon this the Banque Nationale claimed the goods seized on the 3rd February, and Nicholas Turner claimed the goods and chattels seized on the 5th February.

And the sheriff on the 10th February, upon regular notice to the parties, obtained orders for interpleader. These interpleader orders required security to be given by the claimants within one week from the 10th February with the usual penalty of sale and payment into Court by the sheriff on default. No security was given by the claimants. Issues were delivered in the interpleader suits on the 18th February; and about that day the defendant Neville made an assignment under the Act, for the benefit of creditors, to John Moran.

Judgment.  
Master in  
Chambers.

The assignee Moran thereupon claimed the property so remaining undisposed of in the sheriff's hands, and demanded the same from the sheriff.

The goods so seized by the sheriff on the 3rd February are of about the value of \$8,500, and those seized on the 5th February are of about the value of \$475.

The claims of both the claimants are, respectively, as chattel mortgagees.

All this being so, the sheriff has applied to the Court for an interpleader, or, in the alternative, for directions what he shall do with the goods.

(Objections were taken by Mr. Meredith for the execution creditor as to the sufficiency of the assignment on two points. This has been cured by further affidavits, which I allowed to be put in.)

The execution creditor objects to the sufficiency of the assignment on this further ground, that the Act of the Ontario Legislature authorizing such an assignment is not within the jurisdiction of the provincial government to grant—or at least certain parts of the Act, particularly clause 9, which is important here—that an assignment for the benefit of creditors under the Act shall take precedence of all judgments, and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, etc.

This question is, of course, important, and upon it the whole argument in this case has turned.

It is now going on six years since this Act was passed,

Judgment.  
Master in  
Chambers.

and great numbers of assignments have been made under it, and the question has been raised before, but never, as I believe, has it been decided. The Judges of the Court of Appeal are divided in opinion upon it. But, nevertheless, these assignments seem to be largely acted on. Legislation upon bankruptcy and insolvency is reserved to the Dominion Parliament by the "British North America Act," and the objections to these assignments is that they trench upon those subjects which are so reserved to the Dominion.

I will state shortly the facts and circumstances out of which the position arises. Under the Act a man who feels his affairs embarrassed may make an assignment of all his property for the general benefit of all his creditors, and that will be good against an execution obtained against him, and upon that his estate will go into liquidation under the direction of the assignee, for the general benefit of all his creditors ratably. But the making of such an assignment is entirely for the consideration of the debtor himself; no creditor or other person can make him take that course. It can only proceed at the will of the debtor himself, and that debtor, although his conduct has been honourable and prudent, and the deficiency of his means may arise wholly from misfortune, and not from any fault that can be alleged against him, and although he gives up his whole estate, yet cannot insist upon receiving a discharge from his creditors. He can only be discharged from his debts so far as his estate pays them. All the rest he will continue to owe.

And on the other hand the creditor, no matter how much he may have suffered from the conduct of his debtor, can do nothing to bring about such an assignment; no matter how bad the debtor's conduct may have been, nor how much the creditor may have lost by him, the act of assignment depends upon the will of the debtor alone.

So far as I have gone, the assignment would be perfectly good at common law, and there would be no necessity for a statute to authorize it.

What the Act does is to clothe the assignee with powers to carry out that assignment ; and here it is that the objections arise, especially to the 9th section of the Act.

Judgment.

Master in  
Chambers.

Now, for a long period, for many generations, such an assignment has been held good in England, without any Act of Parliament to support it, as against judgment creditors, and was protected by judgments of the Courts in the interest of the general creditors. Judges have highly commended the act of the debtor in making such an assignment, and have pronounced it the most honest thing that an embarrassed man who saw that he could not pay every one in full could do. Be it observed that for all that time the Bankruptcy Acts also were in force in England. Those Acts, as now, provided for an equal *pro rata* distribution among creditors ; but it does not seem to have struck the Judges that it was violating any principle to support measures which sought to establish that equal distribution, by other means than by invoking the bankrupt law, but they appear to have recognized this other means of procuring an equal distribution, which was quite beside bankruptcy. On many occasions, doubtless, it would be less expensive, more convenient, and not likely to occasion those long protracted settlements of estates which sometimes occur to the ruin of individuals. All that our statute has added to that proceeding, which was good at common law, is to give to the assignee the power to carry it out.

At the common law, it is "first come, first served," amongst execution creditors. That common law was developed, we all believe, by strong, wise men, but it was in an entirely different state of society from the present. Then commerce and credit were as nothing compared to our transactions. I say this that I may ask : can it be possible that a legislature which is given power to make laws as to property and civil rights, cannot now modify and restrain the effect of an execution on a judgment, without trenching on the bankrupt or insolvent law ? Can it



Judgment.

Master in  
Chambers.

say to such a creditor who has gained a priority, "it is not right to the general public that the power of seizing all to satisfy your debt should remain, and your execution must be stayed till the other creditors can come in, and they must share with you?" To carry out this, the administration of the estate must be put in an assignee, should the debtor desire it to be done. I do not myself see that that would be an interference with the bankrupt laws. But it is all that is done here.

It should be observed that the dominant intention of the Creditors' Relief Act, and of this Assignment Act that I have been discussing, is not to secure the rights of creditors as between them and their debtors, as against their debtors, but to secure the body of the creditors against the rapacity of some of their own number. If they be like the bankrupt law in securing in a measurable degree an equal distribution among creditors, that is their only likeness.

No measure is authorized against the debtor that did not exist before, and if he please to make an assignment to secure that equal distribution, it will arise from his own volition, and he cannot by means of it secure his own discharge from liability.

I speak of the bankrupt laws as the system established by statutes, where English law prevails. That is the only view of them that is worth thinking about.

There are two main objects in those laws—and only two. To secure that a creditor may enforce a distribution of the debtor's estate among creditors upon the occurrence of the state of things which are specified in the Acts. In such a state of things the power to bring the bankrupt Act into force is always given to the creditor—it may be, not exclusively to him—but it is always given to him, as is natural.

Secondly, the other object is to provide for the discharge from his obligations, of the debtor, upon his satisfying the Court that his failure has arisen from other causes than his misconduct, and that he has throughout acted honestly towards his creditors, and has given up his whole estate.

These are the two objects of the bankrupt laws, and all their provisions are intended to enforce these objects. Neither of these objects would be served by the proceedings authorized by the statute: for, although, by the good will of the debtor, such an assignment may be made, and an equal distribution be so secured, yet the creditor has no means of enforcing such a measure, however flagrantly dishonest the conduct of that debtor may have been. The creditor has no legal right under the statute to such an assignment, any more than the debtor has power to work his own discharge from his debts by means of an assignment.

Judgment.

Master in  
Chambers.

I feel that much more could be said.

I believe that the assignment here is good to convey the estate of the judgment debtor to the assignee, and that consequently, by force of the Act, the administration of the estate is transferred from the sheriff to the assignee. I think that that is the law by force of the 9th section, and that I should therefore make an order for the delivery by the sheriff to the assignee of the property seized. There is, as I understand, but one execution. I think the costs of the sheriff and of the execution creditor must be a charge upon the estate in the hands of the assignee. I do not know of any provision by which the costs of the claimants, the mortgagees, can be provided for.

If I am right, the interpleader instituted for the sheriff's protection must cease. The sheriff can no longer proceed with the execution, and the interpleader is necessarily superseded. The questions raised in it must be settled by the assignee, if the parties desire it. The interpleader could have been instituted only for the purpose of aiding the execution, and when the execution is superseded the interpleader must go with it.

The plaintiffs appealed from this decision, and their appeal was argued by the same counsel before GALT, C. J., in Chambers on the 14th March, 1891.

Judgment. March 21, 1891. GALT, C. J. :—

Galt, C. J.

This is a most important question, as it involves the right of the Province to pass such an Act; the plaintiffs' counsel contending that it is in contravention of the provisions of the B. N. A. Act whereby legislation upon bankruptcy and insolvency is reserved to the Dominion Parliament. Singular to say, this is the first occasion on which the provisions of this section have been expressly before the Court. The case in which the authority of the Provincial Assembly to pass this Act was sustained by the Court of Appeal, is the case *Edgar v. Central Bank*, 15 A. R. 193. The Court in that case was equally divided, and, in consequence, the judgment of the Judge of first instance was upheld, and the appeal dismissed. The question which we have now to consider was not raised in that case; and in giving judgment Burton, J. A., who was one of what may be called the majority, says at p. 200: "This case does not call for any expression of opinion as to section 9, which gives an effect to the assignment which savors more of bankruptcy legislation than any to which I have as yet referred, but I prefer reserving my opinion until some case arises which renders it necessary to place a construction upon it." In the same case, Patterson, J. A., who agreed with Burton, J. A., in upholding the judgment, states at p. 216: "The 9th section enacts that an assignment for the general benefit of creditors, under this Act, shall take precedence of all judgments, and of all executions not completely executed by payment. This strikes me as being a very peculiar enactment. It certainly conveys the impression of providing for something beyond the scope of voluntary assignment by a debtor, and it thus introduces a new consideration into the *ultra vires* discussion. \* \* It cannot, however, affect in any way the claim of this plaintiff against these defendants, and it will be the safer course to reserve the discussion of it until it comes more directly in question."

After these judgments it is impossible to say that the question which is now before me has been decided. In

*Clarkson v. Severs*, 17 O. R. 592, Boyd, C., says at p. 597 : Judgment.  
 “ If it be the right construction under sec. 9 that it passed Galt, C.J.  
 the money to the assignee for creditors, that is giving a  
 higher right than the debtor had, and it strikes me the  
 provision would be *ultra vires*, as being a bankruptcy  
 provision.”

Under these circumstances, although I entirely concur in the expression of opinion given by the learned Master as to the expediency of such an Act, I am unable to agree that effect should be given to it in the manner proposed, viz., that the goods, which had been actually seized and were in the custody of the sheriff for a number of days, should be taken out of the hands of the sheriff and handed over to the assignee. I, therefore, think this motion should be made absolute, and that the sheriff should be instructed to sell the goods and to pay the proceeds into Court, less the costs and fees to which he is entitled, and that the distribution of the money should be hereafter settled. And, under the provisions of Rule 548, I direct that the consideration of that question be adjourned into Court, and call attention to the 55th section of the Judicature Act, which requires that when in any action the constitutional validity of any Act of the Parliament of Canada or of the Legislature of Ontario comes into question, the same shall not be adjudged to be invalid until after notice thereof has been served on the Minister of Justice and the Attorney-General of Ontario.

This question never having been discussed, it is, in my opinion, absolutely necessary that such a notice should be given.

Costs of this reserved.

Pursuant to this judgment the appeal was removed into Court, and notice given to the Minister of Justice for Canada, and to the Attorney-General for Ontario.

The matter was then again argued before GALT, C. J., sitting in Court, on the 17th April, 1891.

*W. R. Meredith*, Q. C., for the plaintiffs.



Argument.

*Robinson*, Q. C., for the Minister of Justice.

*Irving*, Q. C., for the Attorney-General.

*Beck*, for Turner and Moran.

*Kelly*, for the Banque Nationale.

*Middleton*, for the sheriff.

April 27, 1891. GALT, C. J. :—

In consequence of the above opinion, application was made to transfer this case from a Judge in Chambers to an open Court, which was done. Notice was then given to the Minister of Justice and the Attorney-General that a motion would come on to be heard before myself in Court and that the constitutional point proposed to be argued is that it is not within the legislative authority of the Provincial Legislature to enact sec. 9 of ch. 124, R. S. O.

On reference to sec. 2, ch. 124, R. S. O., it will be seen that the persons referred to in the statute are persons at a time when they are in insolvent circumstances or are unable to pay their debts in full, or know that they are on the eve of insolvency, with intent to defeat, delay, or prejudice their creditors. It then provides for assignments for the benefit of creditors, and by sec. 4 "Every assignment made under the Act, for the general benefit of creditors, shall be valid and sufficient if it is in the words following, that is to say—all my personal property which may be seized and sold under execution and all my real estate, credits and effects, or if it is in words to the like effect; and an assignment so expressed shall vest in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent, belonging at the time of the assignment to the assignor \* \* \* ." So far as the effect of a general assignment is concerned, I do not think there could be any objection, that is to say, if it is confined to the rights and property of the insolvent at the time when the assignment is made.

Then comes the section in question, which is as follows:

"An assignment for the general benefit of creditors under

this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of a creditor for his costs who has the first execution in the sheriff's hands." It appears to me that this is conferring on the assignment a much greater effect than the assignor could himself have exercised.

Judgment.

Galt, C.J.

At the time when the assignment in the present case was made, there were two executions in the sheriff's hands, and the goods seized by him were about the value of \$8,975, which was more than sufficient to pay the judgments then in his hands. After the seizure had been made, claims were made by two parties as chattel mortgagees, and the question now is, whether or not the assignee is entitled to take these goods out of the possession of the sheriff. It is manifest that the assignor himself had no such authority, and it appears to me that, that being the case, he could confer no such right on his assignee. By the words of the statute itself, it is plain that the provisions are to have effect only in cases of insolvent debtors or persons on the verge of insolvency; consequently, to attribute to an assignment under the statute a power to remove goods in the hands of the sheriff under execution against an insolvent, must, in my opinion, be considered as an Act relating to bankruptcy and insolvency, which, by the 21st sub-sec. of sec. 91 of the B. N. A. Act, is exclusively vested in the Dominion Parliament.

The order made originally by the learned Master in Chambers must be set aside with costs, and the goods restored to the custody of the sheriff.

The costs of these proceedings to be paid out of the estate.

## [QUEEN'S BENCH DIVISION.]

## REGINA EX REL. MCGUIRE V. BIRKETT.

*Municipal corporations—Controverted municipal elections—Interest of mayor elect in contract with corporation—Unsettled money claim—Master in Chambers, jurisdiction of, to try election case—Rule 30—51 Vic. ch. 2, sec. 4 (O.)—Constitutional law—Powers of Provincial Legislature.*

The defendant had a contract with the corporation of a city for the supply of iron up to the end of 1890, but on the 26th November, 1890, he wrote informing the corporation that he withdrew from his contract, and enclosing his account up to date.

On the 9th December, 1890, the then mayor of the city notified the defendant that he would be held responsible for any expense the corporation should be put to in consequence of his refusal to fulfil his contract.

On the 15th December, 1890, the city council adopted a resolution cancelling the defendant's contract and releasing him from any further obligation in connection therewith. At the same meeting a notice of reconsideration was given, which by the rules of the council had the effect of staying all action on the resolution until after reconsideration. There was no reconsideration and no subsequent meeting of the council till the 7th January, 1891, previous to which the defendant had been elected mayor for 1891. At the time of his election his account above mentioned had not been paid:—

*Held*, by the Master in Chambers, that the resolution had no direct effect to release the defendant from liability under his contract, either at law or in equity; and, whether or not the resolution was to be considered in force, it did not touch the account, the existence of which unpaid was sufficient to invalidate the election, under the other circumstances of the case.

The election was therefore set aside; but, although the relator had notified the electors of the objection to the defendant's qualification, the seat was not awarded to the candidate having the next largest vote, on account of the resolution of the council, which taught the electors to disregard the relator's warning; and a new election was ordered.

*Held*, by MACMAHON, J., that the Master in Chambers had, by the combined effect of Rule 30 and 51 Vic. ch. 2, sec. 4 (O.), all the powers of a Judge to determine the validity of the election of the defendant, and that his determination was final; and it was within the competence of the Provincial Legislature to clothe the Master with such powers.

*Held*, by the Divisional Court, following the principle of the decision in *Re Wilson v. McGuire*, 2 O. R. 118, that the Provincial Legislature had power to invest the Master with authority to try controverted municipal election cases.

## Statement.

THIS was a proceeding in the nature of a *quo warranto*, under the Municipal Act, to set aside the election of Thomas Birkett as mayor of the city of Ottawa, for the year 1891.

The objections to the election were taken under that part of sec. 77 of the Municipal Act, R. S. O. ch. 184, which provides that "no person having by himself or his partner

an interest in any contract with or on behalf of the <sup>Statement.</sup> corporation, \* \* \* shall be qualified to be a member of the council of any municipal corporation."

A fiat for leave to serve notice of motion having been granted to the relator by the Master in Chambers, pursuant to Rule 1038, the motion to set aside the election was argued before the Master on the 16th February, 1891.

*Aylesworth*, Q. C., for the relator.

*J. H. Macdonald*, Q. C., for the defendant.

February 19, 1891. MR. DALTON, Q. C., MASTER IN CHAMBERS:—

This is a motion to set aside the election of the defendant as mayor of the city of Ottawa at the election held on the 29th day of December last, on the grounds that:—

1. The said defendant was disqualified from occupying the office of mayor by reason of his having, at the time of the election, a contract for the supply of hardware with the corporation of the city of Ottawa.

2. By reason of his having by himself an interest in a contract for the supply of hardware to the corporation.

3. By reason of there being at the time of the election an account unsettled and unpaid between the said Thomas Birkett and the corporation, arising out of contract.

4. By reason of there being at the time of the election a dispute in good faith between said Birkett and the corporation, arising out of contract.

There were four candidates for the office at the election, and for Mr. Birkett were given 2,396 votes, and for the three other candidates in all 2,939 votes. The next in order after Mr. Birkett being Mr. Pierre St. Jean with 1,459 votes, being 937 votes below Mr. Birkett.

It is very strenuously contended by the defendant that he did not become bound in any contract with the corporation such as described.



Judgment.

Master in  
Chambers.

The engineer of the corporation had advertised for tenders for the supply of hardware of certain descriptions. It would not help to the understanding of this case, were I to analyze the evidence pro and con. I will state my conclusion, which is very clear to my own mind, that Mr. Birkett did become a contractor to the corporation for the supply of the iron specified up to the 31st December, 1890. This tender was accepted by the corporation to his knowledge, and he furnished the iron under the terms of his tender up to the 26th November, 1890. At that date he wrote informing the corporation that he had that day rendered accounts for the different branches of the corporation, and begged to advise the corporation that he had that day withdrawn all prices given to them, and for the present did not desire to furnish them with any more goods. With that letter was enclosed the account for hardware furnished by Mr. Birkett in the month of November, up to the 26th, amounting to \$115.85.

After the receipt of that letter, on the 9th December, by direction of the then mayor, the clerk of the corporation wrote Mr. Birkett that in consequence of his refusal to fill orders for hardware required during 1890 by the corporation, it had become necessary to procure the same elsewhere, and that he would be held responsible for any expense the corporation would be put to in consequence of his refusal to fulfil the obligation of his contract for hardware supplies. Afterwards, on the 15th December, 1890, at a meeting of the city council on that day, upon a motion that report number 21 of the finance committee be adopted, it was moved in amendment that the following clause should be added to the report of the finance committee: "Your committee would recommend in the matter of Mr. Thomas Birkett, who has supplied certain articles of hardware to this corporation, under an implied contract during the current year, that the said contract, so far as it can be in force, be cancelled, and that Mr. Birkett be released from any further obligations in connection therewith, and that the said report as so amended be received

and adopted." This amendment was carried by 19 votes to 5 votes in the council. Immediately thereafter a member of the council gave notice of reconsideration of the said above mentioned resolution.

Judgment.

Master in  
Chambers

In order to understand the effect of this and of what followed in respect of it, it is necessary to read an extract from the by-law under which the proceedings of the council of the city of Ottawa are conducted. As to reconsideration rule 62 is as follows: "After any question, except one of indefinite postponement, has been decided, any member may at the same, or at the first meeting held thereafter, move for a reconsideration thereof, but no discussion of the main question shall be allowed unless reconsidered, and there shall be no reconsideration unless notice of such reconsideration be given at the meeting at which the main motion is carried, and after such notice is given no action shall be taken by the council on the main motion until such reconsideration is disposed of."

I have no information as to what further occurred, if anything, as to the said resolution. There was no further meeting of the council until the 7th of January, after the election, and I am not told whether anything whatever occurred as to the resolution. I must, therefore, I suppose, conclude that the resolution has no direct effect to release Mr. Birkett from liability under his contract, either at law or in equity. At any rate the debt of the corporation to him, \$115.85, remains unpaid, and it may be subject to dispute and defences. This I think is untouched by the resolution, whether the resolution be considered to be in force or not.

The Canadian cases are strong to shew that the debt on the contract, which certainly existed up to the 15th December, 1890, which debt at all events is not affected by the resolution, and it appears is unsettled to this day, would be quite sufficient to invalidate Mr. Birkett's election under the other circumstances of this case.

That resolution of the council of the 15th December has, however, an important bearing on this case in more ways

Judgment.

Master in  
Chambers.

than one. In the first place it is just to Mr. Birkett to say, that he contends as to his tender that it was only his intention to give a list of prices, and not to become bound to go on for the whole year. As I have said, I think the evidence is against him, and I have found distinctly that there was a contract, but latterly when Mr. Birkett swore that he was under no such contract at the time of the election, it is very important to consider that resolution of the council; for a layman, who must not be expected always to have a lawyer at his elbow, might very well look upon that resolution of the council, carried by 19 members against 5, as absolving him from any liability on the contract from that date, even if he were wrong in supposing that no liability had ever existed.

The relator has taken great pains to notify the electors of the objection taken to Mr. Birkett's qualification; but I must consider how the force of all he could possibly say on the subject was broken by the discussion in the council, which ended in the resolution of the 15th December adopted by so large a majority.

The electors would just regard the whole thing, after such a resolution of the council, as an electioneering manœuvre to defeat Mr. Birkett's election, and would disregard the warning altogether. The majority of 937 for Mr. Birkett proves that to be true.

I must set aside the election with costs to be paid by the respondent, and order a new election to be held for mayor of the city of Ottawa.

The defendant moved to set aside the Master's order, upon the ground that the Master had no jurisdiction to make it, and also appealed from it upon the merits.

As the question of the jurisdiction of the Master involved an inquiry into the constitutional validity of certain enactments of the Legislature of Ontario, notice was given to the Minister of Justice and the Attorney-General of Ontario, pursuant to R. S. O. ch. 44, sec. 55.

The appeal was argued before MACMAHON, J., in Argument. Chambers on the 27th February, 1891.

*J. H. Macdonald*, Q. C., for the defendant. The provincial government have no power to appoint the Master in Chambers as a Judge to try controverted municipal election cases, and, even if they have the power, they have not exercised it. They have given him authority only over procedure and practice. The power exercised by him in this case of removing the defendant from office is not a matter of procedure or practice, and can only be exercised by a Judge appointed by the Dominion government.

He referred to Cooley's Constitutional Limitations (1890), pp. 104, 108; Broom's Commentaries, vol. 1, pp. 320-322; *Hodge v. The Queen*, 9 App. Cas. 117; *Regina ex rel. Wilson v. Duncan*, 11 P. R. 379; *Regina ex rel. Grant v. Coleman*, 7 A. R. 619; *Regina ex rel. White v. Roach*, 18 U. C. R. 226; *In re Kelly v. Macarow*, 14 C. P. 457; B. N. A. Act, sec. 96; R. S. O. ch. 184, secs. 77, 187, 188, 207, 213, 214; R. S. O. ch. 44, sec. 105; 51 Vic. ch. 2, sec. 4 (O.); Rules 30, 31, 846, 1038-1044; The Quebec Circuit Courts Act, and the report of the Minister of Justice thereon.

He also argued the appeal on the merits.

The Minister of Justice was not represented.

*Irving*, Q. C., for the Attorney-General of Ontario, referred to R. S. O. ch. 184, secs. 207, 208; 51 Vic. ch. 2, sec. 4 (O.); Rule 30; *Regina ex rel. Dougherty v. McClay*, 13 P. R. 56; *Regina v. Wason*, 17 A. R. at p. 243; *Hodge v. The Queen*, 9 App. Cas. 117; *Re Wilson v. McGuire*, 2 O. R. 118; *Valin v. Langlois*, 5 App. Cas. 115; 1 Cart. 158.

*Aylesworth*, Q. C., for the relator, referred to 51 Vic. ch. 2, sec. 4, (O.); 52 Vic. ch. 36, sec. 46, (O.); Rules 2, 41, 1038; *Regina v. Bennett*, 1 O. R. 445; *Ganong v. Bayley*, 1 P. & B. 324; 2 Cart. 509; *Re Harris and Hamilton*, 44 U.C.R. 641; *Regina ex rel. Felitz v. Howland*, 11 P. R. 264; *Regina ex rel. Dougherty v. McClay*, 13 P. R. 56; *Regina ex rel. Johns v. Stewart*, 16 O. R. 5, 583. He also argued the case on the merits.

*Macdonald*, in reply, cited B. N. A. Act, sec. 92, clauses



**Argument.** 8, 13; *Gibson v. McDonald*, 7 O. R. at pp. 415, 416, 419; *Darley v. The Queen*, 12 Cl. & F. 520; Cooley's Constitutional Limitations (1890), p. 504; *Regina v. Ward*, L. R. 8 Q. B. 210; *Regina ex rel. Grayson v. Bell*, 1 C. L. J. N. S. 130; *Regina ex rel. Telfer v. Allan*, 1 P. R. 214; *Regina ex rel. Grant v. Coleman*, 8 P. R. 497.

March 19, 1891. MACMAHON, J. :—

This is an appeal from a judgment and order of the Master in Chambers removing the respondent (appellant here) "from the office of mayor of the city of Ottawa, to which he had been elected on the 7th January last."

Notice of the intended motion by way of appeal was served upon the Minister of Justice and the Attorney-General of Ontario.

The principal ground of appeal is that the Master in Chambers had no jurisdiction to hear and determine proceedings in the nature of *quo warranto*; the Ontario Legislature, it being urged, having no power to confer jurisdiction upon him, as it would be in effect appointing a Judge; and (2) if the local Legislature had authority to make such appointment, such power had not been conferred on the Master in Chambers by any legislative enactment.

By section 187 of the Municipal Act it is provided that "In case \* \* the validity of the election or appointment of mayor \* \* is contested, the same may be tried by a Judge of the High Court, or the senior or officiating Judge of the County Court of the county in which the election or appointment took place," etc.

By section 189 "The Judge of the High Court before whom the writ of summons is returnable, may order the evidence \* \* to be taken \* \* before the Judge of the County Court, \* \* and such Judge shall return the evidence to the Registrar at Toronto of the Division from which the writ of summons was issued."

By section 207 "The decision of the Judge shall be final

and he shall, immediately after his judgment, return the writ and judgment \* \* into the Division from which the writ issued, there to remain of record as a judgment of the High Court," etc.

Judgment.

MacMahon,  
J.

And by section 208 the Judges of the High Court may make rules respecting "the practice generally, in hearing and determining the validity of such elections or appointments, and respecting the costs thereon," etc.

It was under the authority assumed to have been given by section 208 that Rule 30 was passed, which provides that "The Master in Chambers, in regard to all actions and matters in the High Court, including proceedings in the nature of a *quo warranto* under the Municipal Act, shall be and hereby is empowered and required to do all such things, transact all such business, and exercise all such authority and jurisdiction in respect to the same as by virtue of any statute or custom, or by the rules of practice of the Superior Courts \* \* or are now done, transacted, or exercised by any Judge of the said Courts sitting at Chambers," etc.

The 51 Vic. ch. 2, sec. 4 (O.), enacts that "whereas the statutory proceedings relating to practice and procedure and the General Orders and Rules of Court have been consolidated and revised by the Judges of the Supreme Court of Judicature for Ontario, and most of the said statutory provisions have in consequence been omitted from the said Revised Statutes, the said Consolidated and Revised Rules of the said Judges are hereby confirmed and declared to have the same force and effect as if the same were herein repeated and enacted," etc.

The exclusive right to make laws relating to municipal institutions rests with the Provincial Legislature by B. N. A. Act, sec. 92, sub-sec. 8, and it is urged on the part of the relator that this carries with it, in addition to the authority to create the tribunal for the trial of municipal controverted elections, the right to appoint a Judge or other officer to hear and determine the validity thereof.

The power to appoint Superior, District, and County

Judgment.MacMahon,  
J.

Court Judges rests with the Governor-General under section 96 of the B. N. A. Act. The power to appoint Judges or officers for the enforcement of laws within the legislative authority of the provincial Legislature, even where such laws require to be enforced by fine and imprisonment, would appear in some instances to rest with the provincial government, where authority has been conferred by the Legislature to make such appointment.

In *Regina v. Wason*, 17 A. R. 221, the Court of Appeal reviewed the authorities up to that time as to the questions on which the provincial Legislature had power to legislate, and Hagarty, C. J. O., at p. 232, after referring to the case of *Cushing v. Dupuy*, 5 App. Cas. 409 ; 1 Cart. 252, said : "The Local Legislature has the exclusive power to legislate on subjects within its jurisdiction and to punish by fine and imprisonment. It must be held, as it has been, that they must have the power to enforce obedience by penalties of fine and imprisonment, on conviction by magistrates, etc. This may be called, in a sense, criminal procedure, and so may the giving of the right to appeal from one Ontario Court to another."

In *Regina v. Bennett*, 1 O. R. 445, the Queen's Bench Division held that the Legislature of the Province of Ontario had power under sub-section 14 of section 92, B. N. A. Act, to pass an Act providing for the qualification and appointment of police magistrates and justices of the peace ; and in *Re Wilson v. McGuire*, 2 O. R. 118, Hagarty, C.J., and Cameron, J., held that the power to appoint officers to preside over Division Courts rested with the provincial government. And under the Division Courts Act the Judge or officer so appointed would have power to imprison for nonpayment of a judgment debt by a debtor brought up under a judgment summons.

In the province of New Brunswick the authority of the provincial government to create officers of local Courts was considered in *Ganong v. Bayley*, 1 P. & B. 324, where it was held that an Act providing for the establishment of Parish Courts, which also provided that com-

missioners should be appointed by the Lieutenant-Governor in council, was not *ultra vires* of the Provincial Legislature. Judgment.  
MacMahon,  
J.

The power of the Judges of the High Court to promulgate Rule 30, empowering the Master in Chambers to exercise all such authority and jurisdiction in respect to *quo warranto* proceedings as is now done and transacted or exercised by any Judge of the said High Court sitting in Chambers, was, no doubt, assumed to have been derived from that part of section 208 of the Municipal Act which says that "they (the Judges of the High Court,) may make rules \* \* respecting the practice generally, in hearing and determining the validity of such elections or appointments." Giving the words the widest possible interpretation, it is impossible to say that the Judges of the High Court had power under that section to delegate the authority to hear and determine *quo warranto* proceedings to the Master in Chambers. The words "respecting the practice generally, in hearing and determining," etc., would indicate merely the practice as to the mode in which the hearing or trial of the proceedings should be conducted before a Judge of the High Court, who alone was by section 187 of the Municipal Act authorized to try the validity of such election, and no greater authority was by that section intended to be conferred.

Rule 30 is in its terms wide enough to clothe the Master in Chambers with the authority of a Judge of the High Court, for all purposes comprised within sections 187 to 207 inclusive, as he is "to transact all such business and exercise all such authority and jurisdiction \* \* as are now done, transacted, or exercised by any Judge of said Courts sitting at Chambers," etc.

If, as I have concluded, section 208 of the Municipal Act is wanting in express authority to the Judges of the High Court to make Rule 30, then it has to be considered whether the statute 51 Vic. ch. 2, sec. 4 (O.), has in express terms adopted and confirmed this particular Rule.

The language of the above section of the Act stating that "the said Consolidated and Revised Rules of the said



Judgment.  
 {MacMahon  
 J.

Judges are hereby confirmed and declared to have the same force and effect as if the same were herein repeated and enacted," is in itself a sufficient confirmation of the act of the Judges in passing the Rule in question, although the meaning of the Legislature in the first and last parts of the section has not been expressed with clearness; or, at least, more apt language might have been employed to express its meaning.

Mr. Macdonald, for the appellant, referred to sections 213 and 214 of the Municipal Act, by the former of which the Judge has power to disqualify, and by the latter to inflict a penalty as well as disqualify, which he claimed the Judges of the High Court had no power to delegate, such authority being of a quasi-criminal character.

Assuming that the provincial government had authority under the Act to appoint an officer to hear and determine all matters relating to controverted municipal elections, then, even although the power did not exist in the Judges of the High Court to delegate the authority for such purposes to the Master in Chambers, what has been done by the Legislature in passing 51 Vic. ch. 2, is in effect the same as if the authority of the Master in Chambers had been originally conferred by legislative enactment.

I have not overlooked that part of Mr. Macdonald's argument referring to the disallowance by the federal government of the Act of the Legislature of Quebec in creating what are known as District Courts for the District of Montreal.

The report of Sir John Thompson, Minister of Justice, upon which His Excellency the Governor-General acted in disallowing the above Act was furnished to me by Mr. Macdonald, and from a perusal of such report it is easy to discern the reasons for the Minister of Justice advising the disallowance of such Act.

The Circuit Court, as it exists in Quebec (whose Judges were under sec. 96 of the B. N. A. Act appointed by the Governor-General), was held by one of the Judges of the Superior Court. When the District Courts were estab-

lished by the local Legislature, authority was given to the provincial executive to appoint magistrates to preside over the same, whose salaries of \$3,000 per annum each were to be paid out of the provincial treasury. The jurisdiction of the District Courts was gradually expanded by the Legislature until it was co-ordinate, or almost co-ordinate, with that of the Circuit Courts, and then the Circuit Courts were by the Legislature abolished.

Judgment.

MacMahon,  
J.

As pointed out by Sir John Thompson (if I may be permitted to say so), in that very able state document, the Circuit Court was then abolished in the district of Montreal, and the places of its Judges commissioned by the Governor-General were taken possession of by the district magistrates. And he proceeds to say that if by a gradual increase of jurisdiction a new Court can be substituted for the Circuit Court, the Legislature would have the right in the same way to go on extending the jurisdiction until the Court was sufficiently equipped to take the place of the Superior Court, and that by the same process the executive of the Province could obtain control of every Court in the Province, the same device if necessary being used to conceal the word "Judge."

In the Act referred to, the endeavour was made to confer upon the Lieutenant-Governor in Council the power to appoint Judges (magistrates) for Courts designated District Courts, which Courts were to be possessed of the jurisdiction of the Circuit Courts, for which they were substituted; and this power of appointment was regarded by the Minister of Justice as a clear invasion of the powers conferred by the B. N. A. Act on the Parliament of Canada.

There is no such invasion of the rights of the Dominion Parliament in the present case. If I am right in holding that, as the provincial Legislature have the exclusive right to make laws relating to municipal institutions, it carries with it the authority to create the tribunal for the trial of contested elections, and the appointment of a magistrate or other officer to hear and determine the validity thereof.

Reaching the conclusion that by the combined effect of

Judgment. Rule 30 and the Act 51 Vic. ch. 2, sec. 4, the Master in Chambers had all the powers of a Judge to hear and determine the validity of the election of the appellant to the office of mayor, and that such determination is final, it becomes unnecessary to consider the other questions raised by the appeal.

MacMahon,  
J.

The appeal must be dismissed with costs to the relator.

*Order dismissing motion and appeal with costs.*

The defendant appealed from this order to the Queen's Bench Divisional Court, and his appeal was argued before ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on the 21st May, 1891.

*J. H. Macdonald*, Q. C., for the appellant.

*Irving*, Q. C., for the Attorney-General of Ontario, and *Aylesworth*, Q. C., and *Latchford*, for the relator, were not called upon.

The COURT dismissed the appeal with costs, holding that the principle of *Re Wilson v. McGuire*, 2 O. R. 118, covered this case, and that this Court was bound by it to decide that the Legislature of Ontario had power to invest the Master in Chambers with authority to try controverted municipal election cases.

Leave was given to the defendant to appeal to the Court of Appeal.

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## [QUEEN'S BENCH DIVISION.]

## RE DWYER AND THE TOWN OF PORT ARTHUR.

*Assessment and taxes—R. S. O. ch. 193, sec. 52—"May," meaning of.*

By section 52 of the Assessment Act, R. S. O. ch. 193, where the assessment in cities, towns, etc., is made, by virtue of a by-law passed under that section, in the latter part of the year, such assessment *may* be adopted by the council of the following year :—

*Held*, that "may" as used here is permissive only, and that the council of the following year are given the option of having a new assessment. Overwhelmingly strong reasons of convenience in favour of having one assessment instead of two might justify the Court in giving to "may" the force of "must."

THIS was a motion by Michael Dwyer, a ratepayer of <sup>Statement.</sup> the town of Port Arthur, for a mandamus to compel the council, in levying the taxes for 1891, to adopt and act upon an assessment roll made by J. J. O'Connor in the previous year; and to quash a resolution of the council passed on 26th January, 1891, declaring that that assessment should not be adopted; and also to quash a by-law of the council passed 2nd February, 1891, appointing one Angus McGillivray assessor for the year 1891.

In April, 1889, the council of Port Arthur passed a by-law under the authority of section 52 of ch. 193, R. S. O., for taking the assessment between 1st July and 30th September in each year for the following year, and this by-law was acted upon in that year. In April, 1890, J. J. O'Connor was appointed by by-law to be assessor for the municipal year ending 31st December, 1890, the by-law requiring his roll to be completed and returned to the clerk not later than 30th September, 1890. He proceeded with his work, and his roll was finally returned by the County Judge before 31st December, 1890.

The council elected for the year 1891 caused an examination to be made of the assessment made by O'Connor, and found, as they considered, that it was not satisfactory. They thereupon, on 26th January, 1891, passed a resolution not to adopt it, but to proceed with a new assessment. Accordingly at their next meeting on 2nd February, 1891,



**Statement.**

they passed a by-law appointing Angus McGillivray to be the assessor for the year ending 31st December, 1891, requiring him to return his roll not later than 30th April, 1891, and repealing all by-laws inconsistent therewith.

The applicant, Michael Dwyer, swore that the assessment of his property had been largely increased by the new roll. The affidavits filed on the part of the corporation shewed a large number of omissions from the O'Connor assessment, and stated that the assessment roll gained some \$150,000 by the change.

The following sections of the Assessment Act, R. S. O. ch. 193, bear upon the matters in question :

49. Subject to the provisions of sections 52 and 54, every assessor shall begin to make his roll in each year not later than the 15th day of February, and shall complete the same on or before the 30th day of April. \* \*

52. In cities, towns, and incorporated villages, the council, instead of being bound by the periods above mentioned for taking the assessment, and by the periods named for the revision of the rolls by the Court of Revision, and by the County Judge, may pass by-laws for regulating the above periods, as follows, that is to say :—For taking the assessment between the 1st day of July and the 30th day of September, the rolls being returnable in such case to the city, town, or village clerk on the 1st day of October; and in such case the time for closing the Court of Revision shall be the 15th day of November, and for final return by the Judge of the County Court the 31st day of December; and the assessment so made and concluded may be adopted by the council of the following year as the assessment on which the rate of taxation for said following year shall be levied, and in the year following the passing of the by-law, the council may adopt the assessment of the preceding year as the basis of the assessment of that year.

65. The roll, as finally passed by the Court, and certified by the clerk as passed, shall, except in so far as the same may be further amended on appeal to the Judge of the County Court, be valid, and bind all parties concerned. \* \*

The application was argued before STREET, J., in Court Argument.  
on the 26th May, 1891.

*Aylesworth*, Q. C., for the applicant. R. S. O. ch. 193, sec. 49, requires the assessment to be made before the 1st of May; sec. 52 gives a different period for towns, cities, and incorporated villages; and sec. 65 provides that the roll shall be final. "May" in sec. 52 means "shall": Stroud's Judicial Dictionary, sub verb. "may"; Bouvier's Law Dictionary, *ib.*; Endlich's Interpretation of Statutes, p. 422; *Julius v. Bishop of Oxford*, 5 App. Cas. 214; *Cameron v. Wait*, 3 A. R. 175, 193; *Tyson v. McLean*, 1 P. R. 339; *Aitcheson v. Mann*, 9 P. R. 473.

*H. Symons*, on the same side, referred as to the meaning of "may" to *The Queen v. The Tithe Commissioners*, 14 Q. B. 459; *Supervisors v. United States*, 4 Wall. 435; *Macdougall v. Paterson*, 11 C. B. 755; as to the right to mandamus, to *Clarke v. Palmerston*, 6 O. R. 616; and as to the finality of the roll, to 52 Vic. ch. 3, sec. 3, sub-sec. 15 (O.).

*Delamere*, Q. C., for the corporation of the town of Port Arthur. "May" means "may," not "shall:" R. S. O. ch. 1, sec. 8, sub-sec. 2. A committee of the council investigated the assessment of 1890, and reported that there were many important errors and omissions, and the council resolved to make a new one.

*Aylesworth*, in reply.

May 28, 1891. STREET, J. (after setting out the facts as above):—

The contention on the part of the applicant is that the assessment roll made for the year 1891, during the autumn of the year 1890 by O'Connor, having been finally completed, became unalterably the roll for the year 1891, and that everything done by the council of 1891 inconsistent with that position is illegal.

The answer to this contention seems to me to be very plain: the legislature in authorizing the councils of cities,

Judgment. towns, etc., to make the assessment in the autumn of one  
Street, J. year for the taxation of the following year, have abstained  
from binding the council for that following year to adopt  
it, but have, by the use of permissive language only, given  
them the option of having a new assessment in the spring  
of their own year of office if they should prefer that course.  
The legislature have said that the new council *may* adopt  
the assessment made under the authority of their predecessors,  
and I cannot say that they *must* do so.

No doubt, plausible reasons could be found in favour of  
the convenience of having one and not two assessments,  
and if these reasons were overwhelmingly strong it would  
justify me in going to the length of giving to the permissive  
“may” the force of the compulsory “must,” but no  
reasons have been suggested justifying such a liberty in  
the present instance; there is nothing in the context which  
requires it; and the words must be left to their natural  
meaning.

The motion must be dismissed with costs.

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## [QUEEN'S BENCH DIVISION.]

## RE GARBUTT.

*Extradition — Evidence — Alibi — Identity — Extradition Judge — Junior Judge of County Court — R. S. C. ch. 142, sec. 6, sub-sec. 2, directory — Forgery — Information — Variance from proof — Christian name of indorser — R. S. C. ch. 174, secs. 57, 58, 70 — Reading over foreign depositions to prisoner.*

Where evidence is given by the prosecution before an extradition Judge positively identifying the prisoner, the Judge cannot receive evidence on behalf of the prisoner to shew an alibi; for that would be in effect trying the guilt or innocence of the prisoner; if the evidence given by the prosecution is sufficient to justify the committal of the prisoner, he must be committed under sec. 11 of the Extradition Act, R. S. C. ch. 142.

*Semble*, that a prisoner is entitled to go into evidence to disprove his identity; but that means his identity with the person named in the warrant, not his identity with the person who actually committed the extradition crime.

The Junior Judge of a County Court is "a Judge of a County Court," and has the functions of an extradition Judge.

*Re Parker*, 19 O. R. 512, followed.

R. S. C. ch. 142, sec. 6, sub-sec. 2, is directory only; and the neglect of a Judge to forward to the Minister of Justice a report of the issue of a warrant, as required by the sub-section, is not a ground for the discharge of the prisoner.

The information upon which a warrant issued committing a person to await extradition for forgery stated the Christian name of the indorser of the forged instrument as Albert, whereas when the instrument was proved it appeared to be James :—

*Held*, that the variance was immaterial under secs. 57 and 58 of R. S. C. ch. 174, which are made applicable to extradition proceedings by sec. 9 of R. S. C. ch. 142.

It was objected by the prisoner that certain depositions taken abroad and put in by the prosecution were not read over to the prisoner, as required by sec. 70 of R. S. C. ch. 174 :—

*Held*, that the objection was not one which as a matter of law would entitle a prisoner to be discharged; and it should not be given effect to as a matter of discretion because it was entirely technical in its character.

THIS was an application on the return of a *habeas corpus* Statement for the discharge of Harry Garbutt from custody under a warrant of the junior Judge of the county of York, acting as an extradition Judge, committing the appellant to await extradition to the State of Texas.

The facts of the case and the grounds of the motion are set out in the judgment of STREET, J., before whom, sitting in Chambers, the prisoner was brought up under the *habeas corpus*, and the application for his discharge argued on the 11th August, 1891.



Judgment.  
Street, J.

*W. G. Murdoch* (*H. W. C. Meyer*, Q. C., and *Tytler*, with him), for the prisoner, referred to *Spear* on Extradition, pp. 309, 310, 338, 468, 477, 479; *Re Kermott*, 1 C. L. Chamb. R. 253; *Regina v. Tubbee*, 1 P. R. 98; *Re Parker*, 19 O. R. 612; *Re Rosenbaum*, 20 L. C. Jur. 165; *Regina v. Lavaudier*, 15 Cox 329; *Rauscher's Case*, 119 U. S. 407; *Re Parisot*, 5 Times L. R. 344; *Guerin v. Bank of France*, *ib.* 160, 162; *Re Guerin*, 60 L. T. at p. 541; *Clarke* on Extradition, 3rd ed., pp. 47, 62-67, 74-77, 120, 170-172, 213, 215, Appendix 8; *Clarke's Criminal Law*, pp. 29, 32-35, 39; *Regina v. Reno*, 4 P. R. 281; *Re Hall*, 8 A. R. 31, 135; *Re Phipps*, *ib.* 77; *Re Woodall*, 4 Times L. R. 532.

*J. W. Curry*, for the State of Texas and the private prosecutors, relied on *Regina v. Reno*, 4 P. R. 281; *Re Caldwell*, 5 P. R. 217; *Re Parker*, 26 C. L. J. 619; *Regina v. Morton*, 19 C. P. 9; *Moore* on Extradition, pp. 526, 1021; *Clarke* on Extradition, p. 216.

August 14, 1891. STREET, J.:—

The prisoner has been arrested under the Extradition Act upon a warrant issued by the junior Judge of the county of York, the charge stated in the information being that of forgery and the uttering of forged paper in the State of Texas. Being arrested, he was brought before the Judge who issued the warrant. Certain depositions taken in Texas and the oral testimony of three witnesses were adduced in evidence against him, and upon these the Judge ordered him to be committed to prison to await extradition.

Evidence was tendered on behalf of the prisoner before the extradition Judge to prove an *alibi*, but was refused.

The prisoner was brought before me upon a writ of *habeas corpus* on 11th August, 1891, and application was made for his discharge upon the following grounds:

1st. That the extradition Judge should have received the evidence tendered on behalf of the prisoner to shew an *alibi*.

In support of this ground a number of affidavits made by the persons whose evidence was tendered before the Judge were filed upon the application for the writ of *habeas corpus*, but I am obliged to disregard these.

Judgment.

Street, J.

Our statute, section 11 of ch. 142, R. S. C., is in accord with what appears to be the universal practice where extradition laws are concerned, and requires the Judge to issue his warrant for the committal of the prisoner upon such evidence being produced as would according to our law justify his committal for trial, if the crime had been committed in Canada.

In the face of the positive identification of the prisoner, it would have been contrary to law for the Judge to receive evidence of an *alibi*, and thus practically to try the guilt or innocence of the prisoner: *Re Phipps*, 8 A. R. 77, p. 109 *et seq.*; Clarke on Extradition, 3rd ed., 218 *et seq.*; *Regina v. Reno and Anderson*, 4 P. R. 281.

If the evidence given by the prosecution is not sufficient to justify the committal of the prisoner, he is entitled to his discharge. If it be sufficient, he must be committed.

An entirely different question is raised where the prisoner insists that he is not the person named in the warrant. For the purpose of establishing that he is not the person named, he is entitled to go into evidence disproving his identity with the person who is being sought for. In the present case the prisoner does not deny being the Harry Garbutt named in the warrant.

The second objection is that Judge Morgan, the junior Judge of the County Court of York, had no authority to act, not being within the designation of a Judge of a County Court. I think that section 11 of ch. 138, R. S. C., is sufficient to shew that a junior Judge of a County Court is a Judge of a County Court. This point was raised before and decided by my brother Rose in *Re Parker*, 19 O. R. 612.

The third objection is that the Judge did not forthwith forward to the Minister of Justice a report of the fact of the issue of the warrant, as required by sub-section 2 of section 6 of ch. 142, R. S. C.

Judgment.

Street, J.

Even if it were sufficiently shewn that this section had not been complied with, it would not be a ground for the discharge of the prisoner, the clause being directory only.

Fourth objection: that the Judge allowed the information upon which the warrant was issued to be resworn and amended during the course of the proceedings before him. The charge as originally laid was that the prisoner had forged the name of Ford, Boghton & Co. to an order for the payment of money addressed to the Chase National Bank, and that he did also forge the name of *Albert Huntley* as indorser, with intent to defraud, and that he uttered the same order well knowing it to be forged. Also with forging a further order on the City Bank of Sherman and the name of James Huntley with intent to defraud. The draft produced purports to be drawn by Ford, Boghton & Co. on the Chase National Bank, New York, payable to James Huntley; the witness House, who appeared in person before the Judge, swore most positively to the identity of the prisoner with the man who in his presence wrote the name of James Huntley upon the back of the order and obtained \$1,500 upon it from a bank in Van Alstyne, Texas.

The proof, therefore, varied from the information in the name of the person appearing as indorser upon the order produced, but the variance appears to be immaterial under secs. 57 and 58 of ch. 174, R. S. C., which I think I am allowed to treat as applying to extradition proceedings by sec. 9 of the Extradition Act.

The evidence adduced before the Judge was, in my opinion, abundantly sufficient to justify the committal of the prisoner for trial. Objection was taken to some of the foreign depositions before the Judge, but this objection was expressly abandoned by counsel for the prisoner upon the argument before me.

The last objection is that the depositions, taken in the United States, of F. M. Adams were not read over to the prisoner, as required by sec. 70 of ch. 174, R. S. C.

The evidence that these depositions were not read over to the prisoner is contained in his own affidavit verifying his petition for the writ of *habeas corpus*. Judgment.  
Street, J.

The prisoner was represented by counsel before the Judge, and his counsel objected to the admissibility of these depositions. The objection was overruled, and the prisoner and his counsel must be taken to have been fully alive to the fact that they were a portion of the evidence intended by the Judge to be considered by him. The present objection is, therefore, entirely technical, and I am not embarrassed by the possibility that the prisoner may have been in any way misled by the fact, if it be a fact, that the foreign deposition was not formally read over to him by the Judge. The omission is not one which, as a matter of law, would entitle a prisoner committed for trial by a magistrate to be discharged; and as a matter of discretion, I will not give effect to it, because it is entirely technical in its character.

The motion for the discharge of the prisoner from custody must, therefore, be dismissed, and he must be remanded to custody again upon the original warrant of commitment.

[A second writ of *habeas corpus* was afterwards granted by GALT, C. J., and a second motion for the prisoner's discharge, upon new material, was referred by consent to the Divisional Court of the Common Pleas Division, where it will come up for argument.]

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## [CHANCERY DIVISION.]

## BEATTY V. RUMBLE ET AL.

*False arrest—Malicious prosecution—R. S. C. ch. 164 sec. 50—Larceny—R. S. C. ch. 174, sec. 25—Apprehension without warrant—Finding of jury.*

Plaintiff who was acting as a bailiff under a landlord's warrant to distrain for rent attempted to remove some grain which had been previously seized by a sheriff under an execution, and while in the act was arrested by the sheriff's officer who was also a county constable. He was committed for trial and was tried but acquitted.

In an action for false arrest and malicious prosecution :—

*Held* that the grain was properly under lawful seizure and in the custody of the law and that by R. S. C. ch 164, sec. 50 anyone taking it away without lawful authority was guilty of larceny, and that by R. S. C. ch. 174, sec. 25 any one found committing such an offence might be apprehended without a warrant and forthwith taken before a justice of the peace, and that the finding of the jury that the defendant acted as a sheriff's bailiff and not as a constable was immaterial, as it was incumbent on any bystander to do as he did; and the action was dismissed with costs.

## Statement

THIS was an action brought by John A. Beatty, against Robert Rumble and Joseph H. Widdifield for damages for false arrest and malicious prosecution.

The defendant Widdifield was the sheriff of the county of York, and as such sheriff had on the 8th of September, 1890, received a writ of *feri facias* against the goods and chattels of one John Gordon. On the following day one of the sheriff's officers seized the goods which consisted of farm stock and implements and grain which had been cut but not threshed, and arranged with the defendant Rumble that the latter should hold possession of the goods for him. A warrant was sent by the sheriff to Rumble on the 10th September. On the morning of the 11th Rumble visited the premises and went away, and when he returned in the evening found the plaintiff there claiming to have made a seizure during his absence under a distress warrant for rent. The plaintiff remained on the premises until the 6th of October, and Rumble visited the premises every day. The grain was threshed under the supervision of Rumble on the 19th of September, and locked up by him in the granary on the premises, of which he kept the key. In the meantime the

solicitor for the landlord had, by letter, demanded the goods Statement.  
from the sheriff under a chattel mortgage given to secure the rent, and interpleader proceedings had been commenced on behalf of the sheriff. Before the interpleader issue was decided the plaintiff undertook to remove the grain, and while in the act of removing the hinges from the granary he was arrested by Rumble who was also a county constable, and who at the time of the arrest had his baton in his hand. Rumble then brought plaintiff to Toronto and laid an information against him for wilfully obstructing him in the lawful discharge of his duty as sheriff's officer. The plaintiff was committed for trial and tried, but was acquitted, and he then brought this action.

The action was tried at Toronto on October 16th, 1890, before SIR THOMAS GALT, C. J., C. P., who dismissed it as against the sheriff, but allowed it go to the jury as against Rumble.

*J. Macgregor*, and *R. L. Fraser*, for plaintiffs.

*Lount*, Q. C., and *Milligan*, for defendants.

The jury found in answer to the question "Was defendant Rumble acting as a county constable or was he acting as bailiff for the sheriff at the time of the arrest?" that he was acting as bailiff, and they assessed the damages at one dollar.

The plaintiff moved in the Divisional Court against the judgment dismissing the action against the sheriff and asked for a new trial against him, and the defendant Rumble also moved to have the judgment against him set aside; and the motions were argued on February 21st and 23rd, 1891, before BOYD, C., and FERGUSON, and ROBERTSON, JJ.

*Macgregor*, for the plaintiff. The action should not have been dismissed as against the sheriff, as Rumble was

**Argument.** merely his agent: *Craft v. Alison*, 4 B. & Ald. 590; Smith on Master and Servant, (Bl. ed.) 297, 298. The question is was the act done by the bailiff Rumble for his own purposes or in doing what he considered was his duty to his master: *Ferguson v. Roblin*, 17 O. R. 167; *Austin v. Davis*, 7 A. R. 478.

*Lount Q. C.*, and *Milligan contra*. Rumble was guilty of no offence. He made the arrest as a county constable. The sheriff is not liable for the act of Rumble, as a master is only liable for the act of his servant when done within the scope of his authority. Anyone who obstructs any person in the lawful execution of any process is guilty of a misdemeanour: R. S. C. c. 162, sec. 34. Anyone who takes or carries away any property under lawful seizure is guilty of a felony: R. S. C. c. 164, sec. 50. Rumble was such an offender that he could have been arrested by any bystander *without* a warrant; much more so could he be arrested by a constable: R. S. C., c. 174, secs. 24 and 25. If a constable makes an arrest and brings the party before a magistrate to be dealt with according to law, and he is wrongly dealt with by the magistrate, the constable is in no way responsible unless he induced the magistrate to take a certain course: *Lyden v. McGee*, 16 O. R. 105; *Watt v. Clark*, 18 O. R. 602.

March 26th, 1891. BOYD, C.:—

In *Giles v. Grover*, 1 Cl. & Fin. 77, Patteson, J., says: "It is undoubtedly true that the sheriff does, by the seizure, acquire a special property in the goods; he may maintain trespass and trover for them. \* \* He is answerable to the creditor if they be rescued, and he is bound to sell them. This property vested in the sheriff, \* \* results from his being the appointed officer of the law. \* \* The goods are in substance *in custodiâ legis*. And Mr. Justice Alderson says, at p. 100: "The special property of the sheriff is given to him that this *custodiâ legis* may be rendered safe."

The whole course of this case demonstrates that the goods in question (being wheat, oats and the produce of other crops), were seized under execution by the sheriff, were so held in execution, pending interpleader proceedings arising out of the claim under the chattel mortgage held by the landlord,—and were ultimately sold by the sheriff, and the proceeds applied according to law. There is very clear recognition of his being in actual possession by reason of the demand of the landlord's solicitor for the payment of the rent, and by the fact that the grain in question was threshed under the sheriff's supervision, and being removed into the granary on the premises, was there locked up for safe-keeping by the sheriff's bailiff, without a word of objection on the part of the plaintiff. But now the contention is, that the possession of this property was rightfully with the plaintiff as bailiff of the landlord, and as having been seized under distress.

Judgment.

Boyd, C.

But the facts are that the seizure under execution was made before the distress warrant was issued or any action thereon was pretended, and the evidence entirely fails to shew any abandonment of this original seizure by the sheriff.

When the plaintiff went on the premises with the power to distrain he knew that the sheriff had already seized ; that his officer had been with the goods seized that morning, and was temporarily absent with the owner of the goods, but meaning to return in the evening, as he actually did. There was this daily visible possession by the sheriff's officer, and during his periods of absence the tenant's wife (who was always there) had promised that her family would not touch any of the goods seized, or allow anybody to interfere with them.

I have no difficulty in holding that at the time of the alleged distress for rent, the crops in question were in the custody of the law and under the protection of the sheriff, and that any such attempt to take possession for the landlord was inoperative: *McIntyre v. Stata and Cryder*, 4 C. P. 248 ; *Rapelje v. Finch*, 14 U. C. R. 249 and 468 ; *Ex parte The Pollen Trustees*, 34 W. R. 442.



Judgment.

Boyd, C.

As the continuation of this original seizure, therefore we find the sheriff's officer in actual possession of the crops at the time of the forcible entry by the plaintiff. That was a rightful possession, and as against the sheriff, the act of the plaintiff was wrongful in itself, and one of which he was advised that the probable consequence would be his arrest.

The plaintiff knowing that the crops were in the custody of the sheriff and locked up for safe-keeping, proceeded to break open the doors of the granary in order to carry off and dispose of this property. Such a manner of seeking redress, as said by Mellor, J., in *Cooper v. Asprey*, 3 B. & S. 937, "is a thing which ought not to be allowed to take place in a civilized community."

Accordingly special legislation is found in Canada whereby every one who secretly or openly takes or carries away, without lawful authority, any property under lawful seizure and detention, is guilty of larceny: R.S.C. ch.164, sec. 50. And any one found committing such an offence may be immediately apprehended by any person without a warrant, and forthwith taken before a justice of the peace: R. S. C. ch. 174, sec. 25. Generally it is laid down that it is the duty of all persons to arrest without warrant any person attempting to commit a felony.

Here the sheriff's bailiff was also a duly appointed peace officer of the county, and this to the knowledge of the plaintiff. He suspecting that an attempt would be made to break into the granary, lay in wait for the plaintiff and arrested him when in the act of removing the hinges with hammer and chisel. This was done, in my opinion, as a peace officer and with "constable's staff" in hand. The jury have found that he acted as sheriff's bailiff, and not as a constable, but the finding is not material, as it was incumbent on any bystander to do as Rumble did.

Having arrived at this result, that the arrest was rightly made, nothing remains but to dismiss the action as to Rumble, and to dismiss the motion as to the sheriff, and both with costs.

FERGUSON, J. :—

Judgment:

I have not written any judgment in this case, but if I had, I would have agreed with the Chancellor, in whose views I entirely concur. The case seems quite plain to me, so I may say I concur with the Chancellor.

Ferguson, J.

ROBERTSON, J., concurred.

G. A. B.

## [COMMON PLEAS DIVISION.]

## REGINA V. BEDERE.

*Criminal law—Rape—Evidence of commission of offence—Evidence, admissibility of.*

On a trial for rape the evidence of the prosecutrix was that the prisoner knocked her down, got on her, pulled up her clothes and committed a rape on her. A witness proved that the prisoner stated that he did no more than her husband would have done.

Evidence was admitted of a statement made by prisoner's counsel at a previous trial on behalf of prisoner, that prisoner had had connection with the woman with her consent and that he had paid her \$1.00 :—

*Held*, that there was sufficient evidence of the commission of the offence ; and that the statement of the prisoner's counsel was properly admitted.

THIS was a case reserved from the Kingston Spring Statement. Sittings of Oyer and Terminer, 1891, by ROSE, J.

The prisoner was tried and convicted of the crime of rape.

The case reserved was as follows :

“During the trial questions arose as to the admissibility in evidence on the part of the Crown of a statement made by the prisoner's counsel to the jury on a previous trial of the same offence when the jury disagreed, such statement having been made by the prisoner's counsel for the prisoner, with the permission of the presiding Judge, the Honourable Mr. Justice Street ; and as to whether there was evidence of the commission of the offence, the prisoner's counsel contending that there was no evidence of actual penetration, and so no evidence of the commission of the offence.

I reserve for the consideration of the Justices of the Common Pleas Division of the High Court of Justice for Ontario, the questions (1), whether the said statement was admissible in evidence on the part of the Crown, (2) whether there was evidence of the commission of the offence.

As far as is necessary to enable the questions to be fully considered the evidence is made part of this case.”

Argument.

This statement on the part of the prisoner is set out in the judgment of GALT, C. J.

In Easter Sittings, June 4th, 1891, the case was argued.

*Smythe*, Q. C., for the prisoner. The evidence was not sufficient to convict the prisoner. It was not sufficient for the Crown to merely show that the prisoner threw the prosecutrix down and committed a rape on her. Evidence should have been given to shew what constituted a rape. The definition of rape is "having carnal knowledge of a woman by force and against her will." At first it was necessary to prove not only penetration but emission. Then proof of penetration was held sufficient, and our statute so provides: R. S. C. ch. 174, sec. 226. But actual penetration must be proved. In cases of burglary or forgery you might just as well convict on the statement that a burglary or forgery was committed: *East's Pleas of the Crown*, p. 434; *West Simcoe Election Case*, 1 Elec. Cas. 137; *Nelson v. Pierce*, 6 N. H. 194; *Games v. Stiles*, 14 Peters, 322, 331; *Regina v. Hughes*, 2 Moo. C. C. R. 190. The statement of counsel at the previous trial should not have been admitted.

*Allan Dymond*, contra. The evidence given by the prosecution was sufficient to constitute the offence. Her evidence was that the prisoner knocked her down, got on her, pulled up her clothes and committed a rape on her, *i. e.* committed the offence of having carnal knowledge of her by force and against her will. The object here was to avoid going into indecent details. The evidence, however, of the prosecution in connection with the evidence of the witness Knapp, and the statement made by the counsel at the previous trial clearly prove the offence.

June 27, 1891, GALT, C. J. :—

There are two points reserved, first, as to whether there was evidence of the commission of the offence; and, second,

as to the admissibility of a statement made by the counsel for the prisoner on a previous trial. Judgment.

Galt, C.J.

I have carefully read the evidence, and, in my opinion, it was sufficient to sustain the finding of the jury. The complainant is a married woman, and is the mother of two children. Her evidence on this particular point was. "Q. When he knocked you down, what did he do to you? He got on to me and pulled up my clothes. Q. Tell me what happened then? He committed a rape on me."

In his charge to the jury the learned Judge, doubtless in reference to the same objection as was urged before us, calls particular attention to what constitutes the crime of rape: he stated, "For in this class of offences there has been always a difficulty in proving actual penetration. Strictly the crime of rape, as indeed you will believe, cannot be proven, unless it is proven that there is penetration; and a very slight degree of penetration is sufficient, under the law, to constitute the crime; but because of the difficulty, sometimes, in proving that, for reasons that I need not go into now, the Dominion Parliament at the last session passed an Act which gave the juries power, where they felt doubt about the penetration, where an assault was made for an indecent purpose, to give not a verdict of guilty of rape, but a verdict of guilty of the lesser offence, namely, indecent assault." (a)

It is therefore manifest the attention of the jury was specifically directed to this question; and when it is borne in mind that in addition to the evidence of the woman there was the testimony of one Knapp (who was not cross-examined), that the prisoner had said to him, "he did not do anything more to Mrs. Bain than Joe Bain would do; that is what he told me and Oliver."

This objection is overruled.

The second point arose in the following manner. At the previous trial what took place was, as stated by Mr. Smythe, who had been counsel at the trial: "The prisoner called no witness. I asked Mr. Justice Street, who

(a) 53 Vict. ch. 37, sec. 13 sub-sec. 4 (D.).



**Judgment.** presided at the trial, to allow the prisoner then to make a statement. He said he would allow him to do so. He said  
**Galt, C.J.** he would prefer I would make it as coming from the prisoner, and I made the statement just as the prisoner made it to me. I made that before my address to the jury."

After consideration his Lordship ruled that the question might be put. The prosecutrix is recalled. She is asked: "At the conclusion of the case did you hear any person make a statement? I did. Who made the statement? Mr. Smythe: that Henry had called, I had gone in the room, he had given me a dollar, and I went into the room, and I told him to come on, that he could have connection with me. That was the statement that was made? Yes, that is what I heard. What do you say about that? Well, that was false, there was no money had, nor there was none talked about. And nothing done at the house at all? No, sir, there was not."

The witness was not cross-examined, we may therefore assume her statement is true. That being the case, it is, in my judgment, the same as if the prisoner had at any time made a statement in reference to his connection with the prosecutrix, when unquestionably she might be asked as to its truth.

MACMAHON, J.:—

All the facts appearing in evidence necessary to be considered in connection with the case reserved have been summarized in the judgment just delivered by his lordship the Chief Justice.

Prior to the Act defining what should be evidence necessary to prove carnal knowledge, there were many cases where the question has arisen as to the degree of penetration necessary to constitute carnal knowledge. But there is no case which I have been able to discover where such a question has arisen as that we are now called upon to consider, namely: Whether the allegation of an assault having been committed, and the prosecutrix knocked down

by the prisoner, her clothes raised, and the prisoner being prone upon her, and the prosecutrix stating that the prisoner had committed a rape upon her, was evidence of the commission of the offence charged in the indictment without proof of actual penetration.

Judgment.  
MacMahon,  
J.

The words used in the indictment in charging the offence are "feloniously ravished and carnally knew." "It has been considered that the words 'did carnally know' are not essential, on the ground that *rapere* signifies legally as much as *carnaliter cognoscere* : 2 Inst. 180 ; 2 Hawk P. C. ch. 25, sec. 56 ; Co. Litt. 137 ; but they are at any rate appropriate in describing the nature of the crime, and appear to be generally used ; Russell on Crimes, 5th ed., vol. i., 864.

The word "ravished" used in the indictment, is no doubt a technical one ; and we have therefore to decide what it can be taken to include when used by a prosecutrix charging that a rape had been committed on her.

The word used by the prosecutrix in her evidence was not "ravish," but "rape." They are, however, synonymous terms, and have the same derivation. "Ravish" means "to have carnal knowledge of, as a woman ; by force, and against her consent."—Webster's Dictionary. "Rape means "sexual intercourse with a woman against her will."—*Ib.* "Rape *raptus* is, when a man hath carnal knowledge of a woman by force and against her will : " Co. Litt 123*b*. And Stephen's Criminal Digest, 171, states : "Rape is the act of having carnal knowledge of a woman without her conscious permission, such permission not being extorted by force or fear of immediate bodily harm."

"Carnal knowledge" is now defined by statute to be complete on proof of any degree of penetration : R. S. C. 174, sec. 226.

By proof of any degree of penetration carnal knowledge is established. Where the evidence is that the prosecutrix was assaulted and thrown down, her clothes raised, and that her assailant got on her, and in addition she alleges

Judgment. that he then ravished her, the ravishment includes carnal  
MacMahon, knowledge, and of course includes penetration.

J.

To my mind there was ample evidence of the commission of the offence charged in the indictment, without the evidence given by Knapp of a statement made by the prisoner which was equivalent to an admission of his having had carnal connection with the prosecutrix. And if he had carnal connection with her, the only question would be whether it was by force and against the will of the prosecutrix.

The other question reserved I think may be disposed of by saying that the Crown could have given the evidence in anticipation of every possible defence which might be offered on the part of the prisoner.

On both grounds of the case reserved the Crown is entitled to judgment.

ROSE, J. :—

I do not feel the same degree of confidence in the sufficiency of the word “rape” used as in this case as do the other members of the Court. I do not dissent from the opinion expressed, and do not further consider the sufficiency of such evidence as I agree that with the evidence of Knapp there was evidence to go to the jury of the completion of the offence.

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## [COMMON PLEAS DIVISION.]

## ASHFIELD V. EDGELL, ET AL.

*Building contract—Dismissal of contractor—Right to remove material and plant—Demand—Conversion.*

By a contract for the erection of certain buildings the contractor was to supply all labour, material, apparatus, scaffolding, utensils, and cartage of every description needful for the performance of the work ; and was to deliver up to the owner, the work in perfect repair, etc., when complete, and was not to sublet any part of the works without the architect's consent ; and all work and material as delivered on the premises was to form part of the works and be considered the property of the owner, and not to be removed without his consent, the contractor to have liberty to remove all surplus material after he had completed the works. Without the architect's consent the contractor entered into a sub-contract with plaintiff for the excavation, brick and masonry work, and the plaintiff commenced work under his sub-contract, and continued to work for some time when he was ordered to discontinue by the architect :—

*Held*, that the plaintiff was entitled to remove from the premises (premises meaning what the parties treated as such) material placed there after he was directed to discontinue, and also material delivered off the premises, as well as plant constituting the fixtures and the apparatus, etc., necessary for carrying on his business, or to recover from the owner the value of any material used by him in the buildings ; but that plaintiff was not entitled to remove any material placed there before he was ordered to discontinue ; and that no demand was necessary, it appearing that the owner was using the same and thus committing an act of conversion.

THIS was an action brought against G. E. Edgell and *Statement.* Thomas Delaney, and was tried before GALT, C. J., without a jury, at Toronto, at the Winter Assizes of 1891.

The defendant Edgell in June 1890, entered into a contract with Delaney to build for him certain stores and residences on King and Sherbourne streets in Toronto, for the lump sum of \$9,100.

The second section of the contract, provided that the contractor should supply all labour, material, apparatus, scaffolding, utensils, and cartage of every description, needful for the performance of the work ; and that the contractor should deliver up the works to the proprietor (Delaney) in perfect repair, clean and in good condition when complete ; and that the contractor should not sub-let the works, or any part of them, without the consent in writing of the architect.



## Statement.

By the 10th section: "All work and material as delivered on the premises to form part of the works and to be considered the property of the proprietor, and are not to be removed without his consent, but the contractor shall have the right to remove all surplus material after he has completed the works herein contracted for."

The plaintiff entered into a sub-contract with Edgell for doing the excavating, mason-work, brick-work, tuck-pointing and drains of the stores and houses on King street under a written contract containing exactly the same clauses as 2 and 10 contained in the contract between Edgell and Delaney.

No written consent was ever given by the architect to the sub-contract between the plaintiff and Edgell, though the proprietor (Delaney) was present almost daily while plaintiff and his workmen were there.

The plaintiff commenced work about 24th June 1890, before the contract between himself and Edgell was executed, and continued to work on the buildings until the 29th July when he was ordered to discontinue work by the architect employed by Delaney.

The architect mentioned in the contract between Edgell and Delaney was a Mr. Fowler; and it appeared that during the time that Ashfield was carrying on the work the architect had cause to object to the work and materials he was putting into the building; he was, however, under the impression that the work and materials objected to had been removed from the structure and replaced by better materials and rebuilt in a workmanlike manner. Upon receiving the notification of the 29th July from Mr. Strickland the then architect employed by Delaney, the plaintiff removed his men and ceased work on the buildings, and he claimed that at that time he had put materials on the ground and work in the buildings to the extent of between 1,500 and 1,600 dollars.

The plaintiff then sent his teams to Delaney's premises to remove bricks and some other material from the premises where he had ceased working, the removal of which Delaney refused to permit.

The learned Chief Justice held that Delaney was liable Statement.  
neither to the plaintiff under the contract between the plaintiff and Edgell, nor otherwise, except as provided by the 2nd clause of the judgment, which was as follows:—“Judgment for plaintiff against Delaney for the material and *plant* left upon or about the premises in question when the work in question was stopped on the 29th July, 1890, and used and applied by the said Delaney in construction of the buildings in question. The amount payable in respect thereof, to be ascertained as hereinafter mentioned.”

There was a reference to an official referee to ascertain and state what was due from the defendant Delaney to the defendant Edgell in respect of the contract between them, and for damages, if any, and what was due by the defendant Edgell to the plaintiff.

A motion was made to the Divisional Court by the defendant Delaney against so much of the judgment as made him liable to the plaintiff for the material and plant left upon the premises in question.

In Hilary sittings, February 13th, 1891, *Arnoldi*, Q. C., supported the motion.

*Bigelow*, Q. C., contra.

June 27, 1891. MACMAHON, J.:—

The contention of Delaney's counsel is that no material or plant could be removed from the premises without his consent until the work was completed: that the contractor would be entitled to remove all surplus material only after the completion of the buildings: that the material and plant are, as between himself and his contractor, the material and plant of Edgell; and that he cannot be called upon to account in any way or be liable to Ashfield in respect of such property: that any remedy that the plaintiff has is solely and exclusively against the person with whom he entered into the contract, who was Edgell.

The contract itself by the second clause includes what

Judgment. is to be provided for by the contractor as material, apparatus, scaffolding, utensils, etc.; and, it is urged, that under the 10th clause all these are to form part of the works and remain there until the completion of the buildings.

MacMahon,  
J.

I think it is clear that the material put upon the premises of the proprietor Delaney, could not be removed therefrom, no matter by whom placed there, as long as placed there with a view to carrying out the contract entered into by Edgell with Delaney, and "premises" would include any portion of the highway permitted to be used in connection with the building operations; and that any sub-contractor supplying material and placing it on the ground, placed it there so as to make it the property of Edgell, the contractor, and irremovable except with the consent of Delaney. The scaffolding, or plant as it is called, it is urged by counsel for plaintiff does not come within the designation of "material" as used in the 10th clause of the contract; and, therefore, Delaney could not prevent its removal by the plaintiff; and his preventing its removal and retaining the same was a conversion thereof.

In Ogilvie's Scientific Dictionary "plant" is defined as "the fixtures, tools, apparatus, etc., necessary to carrying on any trade or mechanical business. The locomotive carriages, van, trucks, constitute the plant of a railway."

While reaching the conclusion from the terms of the contract, that the plaintiff was not entitled to remove from the premises material placed there destined for carrying out the contract, he was entitled to remove the "plant" which constituted the fixtures and apparatus etc., for carrying on his trade or business as a contractor.

The ground was taken by counsel for Delaney, that no demand had been made for the plant. The only evidence of a demand having been made was that which was contained in the request to permit some of the material in the shape of bricks to be removed, which permission Delaney refused to grant, and I have held he was justified in so refusing. But there need not be a demand where Delaney was doing an unauthorized act, by using the "plant"

to carry on his building operations, which deprived the plaintiff of his property for an indefinite time; and he was guilty of a conversion of it "because it is an act inconsistent with the general right of dominion which the owner of a chattel has in it, who is entitled to the use of it at all times, and in all places." Addison on Torts, 6th ed., 500. See also *Hiort v. Bott*, L. R. 9 Ex. 86; *Burroughes v. Bayne*, 5 H. & N. 296, at p. 303; *Fouldes v. Willoughby*, 8 M. & W. 540, at p. 547, per Lord Abinger, C. J.

Judgment.  
MacMahon,  
J.

Delaney cannot be made liable for the materials placed on the premises by the plaintiff prior to the 29th of July, as Edgell would be answerable to the plaintiff for the value thereof under the contract between them, or at least any claim of the plaintiff in respect of such materials must be determined under such contract. The plaintiff is, however, entitled to recover from Delaney the value of the plant, which the defendant had converted to his own use; as also the value of any material not placed upon the premises, or which was brought upon the premises subsequent to the 29th of July, when he was notified to cease building operations.

The judgment of his lordship the Chief Justice, should I think, be varied as above indicated.

Each party having succeeded as to part of the motion, there will be no costs of the motion to either side.

ROSE, J.:—

I agree that the plaintiff, whether considered as a subcontractor doing the work for Edgell with Delaney's assent, or doing it under a contract with Edgell without the plaintiff's knowledge or assent, can stand in no better position as to material delivered on the premises than if he had been the contractor under the contract made between Edgell and Delaney. He knew the terms of the contract under which Edgell was to do the work and the material that he delivered on the premises was for the purpose of putting into the works and was subject to the agreement



Judgment.  
Rose, J.

between Delaney and Edgell. Delaney could not be put in a worse position by reason of Edgell employing another to do the work. Whoever was so employed must be held to have undertaken to do the work as Delaney required the work to be done, and under the terms stipulated for by Delaney.

It also seems clear, looking at the contract, that the word "material" cannot be held to include "plant." It is used in several places in the contract, and in no place can it be fairly construed to include plant. Edgell undertook to provide "good, proper and sufficient material \* \* for completing and finishing \* \* the works." By the 2nd clause of the contract he was "to provide all manner of labour, material, apparatus, scaffolding, utensils, cartage of every description needful for the due performance of the several works." And in the 10th clause it is provided "all work and material as delivered on the premises, to form part of the works;" and that "all surplus material" after the completion of the works, shall belong to the contractor who shall have the right to remove the same. The plant was not to form part of the works and could in no sense, be described as surplus material.

The construction of the 10th clause is, I think, not difficult. Similar clauses have been considered in the Courts in England and are discussed in Emden's Law of Building Contracts, 2nd ed., at p. 199 *et seq.* See specially *Brown v. Bateman*, 2 L. R. C. P. 272; *Blake v. Izard*, 16 W. R. 108; *Reeves v. Barlow*, 12 Q. B. D. 436. I think the clause means just what it says, that the material delivered on the premises for the purpose of forming part of the works is to be considered the property of the proprietor, and not to be removed without his consent. Two things are requisite, 1st that the material shall be delivered on the premises; 2nd that it shall be delivered to form part of the works.

I think "premises" indicate the premises in fact if I may use that expression, that is to say, whatever the parties treated as the premises for the purpose of deliver-

ing and storing material. It will be observed that the clause does not say, as in *Brown v. Bateman*, that the material shall be considered as immediately attached to and belonging to the premises, but merely says that it is to be considered the property of the proprietor. Whatever, therefore in the present case the parties treated as the premises, I think must for the purposes of the contract be considered and held to be the premises.

I am somewhat in doubt, on the evidence, as to whether or not some of the material used by Delaney was delivered on the premises. Delaney in his evidence speaks of the premises as having been fenced in, and of a delivery on the street outside of 2,000 bricks. If a portion of the street was fenced in and used as part of the premises with the license or permission of the civic authorities I see no reason for not holding that such portion of the street was part of the premises. Upon the reference which has been directed, having regard to the opinion I have expressed, I think the referee should enquire and report as to whether any material was delivered on land not being a part of the premises, and if so, the value of it. In my opinion the plaintiff is entitled to recover the value of any material not delivered on the premises which has been used by Delaney.

Then was any material delivered either on the premises or on the ground outside, which was not delivered to form part of the works? Apparently one load of brick was so delivered. In my opinion when the plaintiff was notified not to proceed with the work, in other words dismissed from performing the contract, he then, under the express terms of the agreement, had no right of admission to the ground, and if he had gone upon the land, after receiving such notice and contrary to the will of Delaney, he could have been treated as a trespasser. I think it follows that he had no right to deliver any material on the ground, and could have been ordered to take it away. I use the word "ground" as synonymous with "premises," both words are used in the contract. If, therefore, after the plaintiff received notice of dismissal, any material was delivered on

Judgment.

Rose, J.

Judgment. the premises, it cannot, I think, be held to have been delivered to form part of the works and the plaintiff was entitled to remove it, and if prevented from removing it, or if the material was taken and used by Delaney, I think it was a conversion by Delaney for which the plaintiff is entitled to recover. The referee should therefore enquire whether any material was delivered after the plaintiff was dismissed, and, if so, to report the value of such material.

Rose, J.

I have already stated that, in my opinion the plant did not come within the provisions of the 10th clause; it was therefore the plaintiff's, and did not become the property of Delaney.

When the plaintiff was dismissed he had the right to take away the plant, and, as far as I can see, Delaney had no right to use it. Delaney, neither by his pleadings, nor by his counsel at the trial, admitted the right of the plaintiff to the plant, but put him to proof of his case. At the trial counsel stated to the learned Chief Justice, the positions assigned by them. And Mr. Arnoldi said: "all the plant and materials that were brought on the premises, were brought in under the contract with Edgell, who is our contractor, and when we dismissed the contractor we had a right to use that material and plant."

The position thus taken afforded evidence of what Delaney's intention had been from the first with respect to the plant, and no doubt, the learned trial judge acted upon it. In Bullen and Leake 2nd ed., at p. 253, the cases respecting conversion of goods or trover are collected, and a conversion is there defined to be "a wrongful interference with goods, as by taking, using or destroying them, inconsistent with the owner's right of possession." The learned author further says: "to constitute this injury there must be some repudiation by the defendant of the owner's right, or some exercise of dominion inconsistent with it. Where the conversion cannot be proved by any positive act, it may be inferred from proof of a demand of the goods by the plaintiff, and a further refusal to deliver them by the defendant, he having the control over them at the time."

A demand followed by refusal is therefore merely evidence of the conversion, and is not necessary to constitute a conversion. The question of conversion was considered by this Court in *Pardee v. Glass*, 11 O. R. 275 ; and *Polson v. Degeer*, 12 O. R. 275.

Judgment.

Rose, J.

The learned Chief Justice has found that the plant was converted by the defendant ; and I cannot say that there was not evidence upon which such finding could properly be based. I desire to confine my opinion as to conversion of the plant, to the facts of this case. I do not say, that there might not be a temporary user which would not amount to a conversion.

I think, therefore, the plaintiff must recover the value of the plant, also of any material not delivered upon the premises, and which was used by the defendant Delaney, as well as the value of material delivered, whether on the premises or not, which was not delivered to form part of the works, that is, which was delivered after the plaintiff was dismissed by the defendant Delaney.

I agree that there should be no costs to either party of this motion.

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## [COMMON PLEAS DIVISION].

## BRICKER ET AL. V. CAMPBELL.

*Defamation—Partners—Slander of firm—Right of action.*

The two plaintiffs were the members composing a firm, which firm had sold out the business to a company composed of the plaintiffs and another, the old firm continuing in existence for the purpose of being wound up. In an action of slander, the innuendo charging insolvency to the company, the jury found that the imputation of insolvency had no reference to the company but to the plaintiffs as members of the firm: *Held*, that on a record properly framed, the two plaintiffs might recover for any damage accruing either to them as individuals or to the firm, without proof of special damage, and also as members of the company, for any special damage suffered by the company by reason of the slander of two members thereof, but on the record as framed here the plaintiffs must fail; and as no amendment was asked for at the trial, and no reason given for allowing one on appeal to the Divisional Court, it was refused.

## Statement.

THIS was an action tried before ARMOUR, C. J., and a jury at Stratford at the Spring Assizes of 1891.

The action was for slander, charging that the defendant on or about the 13th November, 1890, to one Charles Hess falsely and maliciously spoke of the plaintiffs in relation to their business as merchants, as follows:

“If we were not careful with the cents we would not be careful with the dollars, and would have to compromise like Brickers.” The innuendo charging: “Meaning thereby that the plaintiffs had been negligent, and were careless in the management of the details of their business, and had been compelled to effect a compromise with their creditors.” The plaintiffs also charged that about the same time the defendant spoke to John Glen these words in relation to their said business: “We pay 100 cents on the dollar for our goods, and don’t compromise at forty cents like the Brickers.” The innuendo charging: “Meaning thereby that the plaintiffs were insolvents and unable to meet their liabilities, and were about effecting or had effected an arrangement for composition with their creditors at the rate of forty cents on the dollar.”

The defence was the simple denial of making the alleged <sup>Statement.</sup> statements; and that, if made, they could not be construed into the meaning alleged in the statement of claim.

The plaintiffs Moses and Samuel Bricker had up to the 16th of June, 1890, been carrying on the hardware business at Listowel under the firm name of Bricker Bros., and on that date they sold out the business to the plaintiffs Moses, Samuel and Jacob Bricker, the younger, who carried on the business under the name of the Bricker Hardware Company. The firm of Bricker Bros., notwithstanding the disposal of their hardware trade to the Bricker Hardware Company, continued as a firm liquidating their old business.

The alleged slander was in November, 1890, and Samuel Bricker, one of the plaintiffs, afterwards sold out his share and interest in the business to Moses Bricker and Jacob Bricker, the younger, they agreeing, in addition to paying him for his interest in the business, to pay all the liabilities of the firm, which would, he alleged, include the costs of this action, and he transferred to them all his rights and interest in connection with the suit.

It was uncertain at the trial whether the slander, which the two witnesses Hess and Glen said had been uttered, was in relation to the firm of Bricker Bros., or whether it had reference to the then going concern of the Bricker Hardware Company, represented by the three plaintiffs.

The charge of the learned Chief Justice was to the effect that if the words were spoken in relation to the Bricker Hardware Company, and did not mean the old firm of Bricker Bros.; or, if it was doubtful which it was, the plaintiffs must fail; that the cause of action as framed was for a slander upon the then existing members of the firm suing in the firm name of the Bricker Hardware Company, and if the slanders, or either of them, did not refer to that company the plaintiffs could not succeed.

The jury on the charge brought in a special verdict stating that "We, the jury, are unanimous in the opinion

Statement.

that the words contained in the slander, if made use of at all, referred exclusively to the firm of Bricker Bros., and in no way refer to the firm of the Bricker Hardware Company." Upon that finding judgment was directed to be entered for the defendant, dismissing the action with costs.

The plaintiffs moved on notice to set aside the verdict for misdirection on the part of the learned Chief Justice to the jury in directing them that "Unless the slanderous words complained of were spoken of the hardware company their verdict should be for the defendant." And for non-direction, because he should have directed the jury that if the words in question were spoken of any one or more of the members composing the plaintiffs' firm the plaintiffs were entitled to recover. The plaintiffs also asked that the statement of claim, if required, might be amended so as to enable the plaintiffs to recover such damages as they might be entitled to in respect to the speaking of the said words of individual members of the said firm, or to enable the plaintiffs or some of them to recover individually such damages as they individually might have suffered by reason of the speaking of the said words; and for a new trial upon such amendment being made.

In Easter Sittings, June 4th, 1891, Shepley, Q. C., supported the motion. There was clearly misdirection and nondirection by the learned Chief Justice. Several causes of action in different rights can now be maintained: Con. Rules 300, 345. The action is therefore maintainable by the plaintiffs as individuals for any damage sustained by them as individual members of the firm Bricker Bros. or of the Hardware Company, or by the firm or company of which they were partners: Odgers on Libel and Slander, 2nd ed., 417-9; *Harrison v. Bevington*, 8 C. & P. 708; *Robinson v. Marchant*, 7 Q. B. 918. The action is properly framed for such purposes; but, if an amendment is necessary, it should be granted.

*Walter Read*, contra. The plaintiffs must stand or fall on the cause of action as laid by them in their statement

of claim. The cause of action alleged is for a slander on the Bricker Hardware Company, while the jury have found that the alleged slander, if any, was against the firm of Bricker Bros. The plaintiffs have therefore failed to maintain their action as laid, and the judgment was properly entered for the defendant. If, however, it is a question of doubt whether the slander as laid is of the firm or the company, then the plaintiffs must certainly fail for the plaintiffs must clearly allege and prove the slander, and they have failed to do so. The case of *Taylor v. Church*, 1 E. D. Smith's Rep. N. Y. 279, 285, succinctly states the view relied on by the defendant. See also *Townsend on Slander*, pp. 228-30, sec. 185; *Haythorn v. Lawson*, 3 C. & P. 196; *Cook v. Batchellor*, 3 B. & P. 150.

*Shepley*, Q. C, in reply. The case of *Taylor v. Church*, 1 E. D. Smith's Rep. 279, as a matter of fact is in a line with the cases relied on by the plaintiffs and strongly supports the plaintiffs' contention.

June 27th, 1891. MACMAHON, J.:

In *Townsend on Slander and Libel*, 4th ed., p. 185, one phase of the question we are asked to consider is thus treated by the author:—"Where language concerns one only of several partners, but touches him in his partnership business, there is an injury to the partnership business, for which the partner whom the language concerns may sue alone, or all the partners may unite with him. Thus where the language was of one of several partners as bankers, and imputed to him insolvency, and for this he alone brought suit, alleging damage to the partnership business, it was pleaded in abatement that the plaintiff carried on his business jointly with A. & B., and that the alleged damage accrued to A. & B. jointly with the plaintiff. On general demurrer the plea was overruled; but a question was raised whether a special demurrer might not have been interposed to the declaration for uniting damages which accrued to the plaintiff with damages which accrued to his partner.



Judgment.

MacMahon,  
J.

In other words, as the damage to the business was jointly to the plaintiff and his partner, was it proper for plaintiff to allege them in his declaration? It was assumed that on the trial the jury would separate the damages:” Citing *Robinson v. Marchant*, 7 Q. B. 918.

Lord Abinger in his judgment in *Robinson v. Marchant*, at p. 926-7, said: “ Words spoken of a trader in the way of his trade, and imputing insolvency, are actionable in themselves. But it is argued for the defendant that the damage here complained of includes not only such as might accrue to the plaintiff alone, but the special damage which the firm is said to have sustained, and that the two cannot, for the present purpose, be distinguished. Whether this would have been a sufficient objection on special demurrer to the declaration, it is not necessary to say. On the trial, the special damage might and must have been separated from the more general damage, and the jury in their verdict might have considered the last without the first. One mode of examining the question before us would be to ask if the defendant, in pleading could have separated the allegation of special damage from the other matter of complaint, and traversed that allegation? If that would have been no sufficient answer, it cannot be a ground for a plea in abatement that the averment of special damage appears in the declaration united with that of general damage.”

The Judicature Act has made a radical change as to the joinder of plaintiffs in actions of tort. By Con. Rule 300, “ All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative.” And by Con. Rule 345, “ Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant.” It has been held in England under the corresponding Rules there (Order XVI. Rule 1, and Order XVIII. Rule 6), that “ it is no longer necessary to bring two actions for the same words: each individual partner should be named in the writ, and he can recover separate damages for any special injury done to himself, the firm at the same

time recovering their joint damages:" Odgers' Law of Libel, 2nd ed., 418, citing *Booth v. Briscoe*, 2 Q. B. D. 496. Judgment.

In *Booth v. Briscoe*, the plaintiffs were the eight trustees of certain charities, and the action was for a libel published by the defendant commenting on the improper management of the charities by "the trustees." And it was held that under Order XVI. Rule 1, an action for libel might be brought by two or more persons jointly, although they are not in partnership or otherwise jointly interested. Lord Bramwell in delivering the judgment of the Court of Appeal, said, at p. 497: "Where a tort has been done, the tort is a separate tort to each man who complains. If indeed there were a joint tort, for instance, slander of several persons in partnership, the persons injured would have joined and maintained the action, but could have maintained the action for the joint damage only. Here there is no joint damage."

MacMahon,  
J.

In *Taylor v. Church*, 1. E. D. Smith's R. N. Y. 279 (to which we were referred by Mr. Read), the headnote is: "A publication unfavourably reviewing the credit and standing of a mercantile firm, and charging one member thereof with dishonesty, is libellous *per se*; and an action will lie by the partners for the injury to the business or credit of the firm. A firm may recover for such a libel without proof of special damage."

In that case there were undoubtedly the two elements to be considered—an unfavourable review of the credit and standing of the firm, and the charge of dishonesty against one member thereof; but the question as to the right of the firm to maintain an action by reason of a slander on one member thereof when spoken in relation to his business, is skilfully dealt with, and I therefore extract the following from the judgment of Ingraham, J., in delivering the opinion of the Court, at p. 286: "I concede that the action cannot be maintained except for injury to the firm, and that the individual members are not to be compensated in this action for injury they may have separately sustained. Nor can this action be maintained for libellous

Judgment. matter affecting Taylor alone, unless it can be so connected  
MacMahon, with the interest of the firm as to show that it related to  
J. the firm as well as to the individual solely." And at p. 287: "In this case if the words taken in their natural sense impute to the firm, either in the whole or component parts of the firm, anything injurious to their business and standing as a mercantile firm, they are actionable."

"For libels reflecting on the moral conduct of the members of a firm, it has been held that they are entitled to sue in separate actions: that in order to sustain an action brought by them jointly in respect of such imputations, special damage to the firm must be alleged; and, therefore, that unless a joint interest was affected several actions should be brought, though the same words were spoken, or libel published, concerning two": Folkard's Law of Slander and Libel, 5th ed., 379.

Had the slander in this case imputed to Samuel Bricker and Moses Bricker insolvency in connection with the business of the Bricker Hardware Company of which they were members, the firm of three could under the Consolidated Rules referred to, have maintained a joint action for damages, and Samuel and Moses could by the same writ sue for the damage to them individually.

The rules as to the right of a partner in a firm who has been slandered in his business and of the firm which has been slandered through one of its members, to maintain actions and the nature of the damages to be recovered in such actions, are succinctly stated in Lindley on Partnership, (5th ed.), pp. 278-9: "A libel on a firm can be made the subject of an action by the firm. If the libel reflects directly on one partner, and through him on the firm, two actions will lie, viz., one by the party libelled, and the other by him and his co-partners" (the two actions can now be combined in one); "but the damage in the first action must not appear to be joint, nor must that in the second appear to be confined to the libelled partner only. See *Harrison v. Bevington*, 8 C. & P. 708; *Forster v. Lawson*, 3 Bing. 452; 2 Wms. Saund. 383; *Haythorn v. Lawson*, 3 C. & P., 196. If one partner is libelled, and the firm cannot be shewn

to have been damnified, an action for the libel should be brought in the name of the individual partner aggrieved, and not by the firm : *Solomons v. Medex*, 1 Stark 191 ; and he may sue alone, although the libel more particularly affects him in the way of his business : *Harrison v. Bevington*, 8 C. & P. 708 ; *Robinson v. Marchant*, 7 Q. B. 918.”

Judgment.  
MacMahon.  
J.

Although Lord Abinger, in *Robinson v. Marchant*, 7 Q. B. 918, appeared to think that where a member of a firm is slandered in his trade or business, he could not only maintain an action without proof of special damage, but could also recover for the special damage caused to the firm by reason of the slander, I consider the fair result from a consideration of the authorities to be that where the libel is on a member of a firm in respect of his trade or business the partner libelled can recover without proof of special damage, but the partners must sue jointly for any special damage sustained by the co-partnership.

In the present case the jury found that the slander, if uttered by the plaintiff, referred to the firm of Bricker Bros., and not to the Bricker Hardware Co., so the plaintiffs were not by the alleged slander referred to jointly as partners. But Samuel Bricker and Moses Bricker claim that as all the partners' names are separately mentioned in the writ, they all and each of them are entitled to recover by reason of the slander imputing insolvency to them. But the imputation of insolvency was in regard to their connection with another firm—Bricker Bros.—and was not directed against them as members of the other firm, the—Bricker Hardware Company. It is possible an amendment, if desired, might have been made at the trial so as to have enabled Moses and Samuel to recover in this action the damages sustained by the firm of Bricker Bros. But no motion was made to amend, and as the desired amendment could not now be made except upon payment of the costs of the last trial, and of this motion and the amendment, Samuel and Moses will be in as favourable a position by bringing a fresh action if they are so advised.

The motion must be dismissed with costs.



Judgment. ROSE, J.:—

Rose, J.

On a record properly framed I have no doubt that the two plaintiffs comprising the firm of Bricker Bros. could have recovered for any damage accruing to them either as individuals, or to the firm of Bricker Bros., without proof of special damage, and that the plaintiffs composing the firm of the Bricker Hardware Company also could have recovered for any special damage that firm might have suffered by reason of the imputation of insolvency to two of the members of that firm. It is not necessary to determine whether for such a slander of two members of the firm not aimed at the firm, or naming the firm, the firm could recover without avowing or proving damage to the firm. My inclination is to the contrary.

But I agree to the conclusion my learned brother MacMahon has arrived at, that on this record the plaintiffs cannot recover, for the words are alleged to have been spoken of the plaintiffs' firm, and are not alleged to have been spoken of two of the members of the firm, causing injury to the firm.

The fact having been found contrary to the averment, and no amendment having been asked for at the trial, I see no reason for now allowing it. No special damage was either alleged or proven, and probably none was suffered.

The parties may litigate their rights in a new action, if it is worth while.

GALT, C. J., concurred.

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## [COMMON PLEAS DIVISION.]

REGINA V. FRANK CORMACK.

*Criminal law—Forgery—Incomplete note—Payee's name in blank.*

Where in an instrument in the form of a promissory note a blank is left for the payee's name, it is not a completed note so as to support a conviction for the forgery thereof, or for the forgery of an indorsement thereon; nor is it a document, writing, or instrument within sections 46, 47, or 50 of R. S. C. ch. 165.

*Semble*, a conviction might have been sustained on an indictment for forgery at common law.

THIS was a case reserved by Mr. Justice Falconbridge Statement. before whom the prisoner was tried, for the consideration of the Justices of the Common Pleas Division.

The trial took place at the Woodstock Assizes on the 10th day of March, 1891, on an indictment, the first and second counts of which were as follows :

PROVINCE OF ONTARIO, }  
COUNTY OF OXFORD. }  
To Wit.

The jurors of our Lady the Queen upon their oath present, that Frank Cormack on the thirteenth day of September, in the year of our Lord one thousand eight hundred and ninety, at the township of East Zorra, in the County of Oxford, feloniously did forge a certain promissory note which said forged promissory note is as follows, that is to say :

\$200.00.

WOODSTOCK, SEPT., 1890.

Twelve months after date I promise to pay to the order of  
at the Molson's Bank, two hundred dollars for value received.

(Signed) FRANK CORMACK.

(Signed) MRS. D. CORMACK.

with intent thereby then to defraud against the form of the statute in such case made and provided and against the peace of our Lady the Queen, Her Crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Frank Cormack, afterwards, to wit on the day and year aforesaid, feloniously did offer, utter, dispose of and put off a certain other forged promissory note, which said last mentioned forged promissory note as follows, that is to say :

Statement. \$200.

WOODSTOCK, SEPT., 1890.

Twelve months after date I promise to pay to the order of  
at the Molson's Bank, two hundred dollars for value received.

(Signed) FRANK CORMACK.

(Signed) MRS. D. CORMACK.

with intent thereby then to defraud, he the said Frank Cormack at the time he so uttered and published the said last mentioned forged promissory note as aforesaid, well knowing the same to be forged, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

The third count of the indictment charged that the prisoner feloniously forged the name "Miss Mary Tomlinson" on the back of the said instrument set out in the first and second counts. And the fourth count charged that having in his possession the said promissory note with the forged indorsement of "Miss Mary Tomlinson," he then offered, uttered, put-off and disposed of the same, then well knowing the same to be forged.

The learned trial Judge as part of the reserved case stated:

"It was clearly proved that the prisoner forged the name 'Mrs. D. Cormack' to the instrument set out verbatim in the first and second counts of the indictment. Also that he forged the name 'Miss Mary Tomlinson' on the back of the same instrument as set out in the third and fourth counts of the indictment; and that he uttered the same with intent to defraud; and no question arises on the evidence."

The prisoner was found guilty; and was admitted to bail to appear for sentence when called upon.

The questions reserved for the consideration of the Court were:

1. Whether the instrument set out verbatim in the two first counts of the indictment was a promissory note.

2. If not a note, was it a document, writing or instrument, however designed, coming within the provisions of sections 46, 47 or 50, of the R. S. C. ch. 165, entitled "An Act respecting Forgery;" and, if so, could the prisoner be properly convicted of forgery on the said indictment?

On 4th June, 1891, the case was argued before GALT, *Argument*. C.J., ROSE and MACMAHON, JJ.

*J. R. Cartwright*, Q.C., for the Crown. The main question presented here is, was the instrument in question a promissory note, a blank having been left for the payee's name? The document comes within the definition of a note; at all events, it was a document within sections 46, 47, or 50 of the Forgery Act, R. S. C. ch. 165: *Regina v. Harper*, 7 Q. B. D. 78; *Rex v. Wicks*, R. & R. 149; *Regina v. Williams*, 2 Den. C. C. 61; *Regina v. McFee*, 13 O. R. 8; Bills of Exchange Act, 53 Vict. ch. 33, secs. 20, 82, (D.)

No one appeared for the prisoner.

June 27th, 1891. MACMAHON, J.:—

Ever since the decision of Chief Justice Willes in 1742, in *Colehan v. Cooke*, Willes, 393, at p. 397, a promissory note has been described as "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a determinable future time a sum certain in money to or to the order of a specified person or to bearer." This is also the definition in the Bills of Exchange Act, 53 Vict. ch. 33, sec. 20, (D).

"There must be two parties to a promissory note in its origin, and they must be different persons, namely: (1) The person who makes the promise, called the maker. (2) The person in whose favour the promise is made, called the payee." Chalmer's Bills of Exchange, 2nd ed., 244.

So that an instrument in the form of a note but payable to the maker's own order is not a note; but by the maker's indorsement it becomes a valid note payable to the bearer: *Hooper v. Williams*, 2 Exch. 13; *Masters v. Baretto*, 8 C. B. 433. See also Bills of Exchange Act, 53 Vict. ch. 33, sec. 29, sub-sec. 1.

*Crutchley v. Mann*, 5 Taunt. 529, is a clear authority that where a blank is left for the payee's name in a bill the instrument is inchoate; but it may become a perfected



Judgment. bill by the blank being filled up by any bearer with his  
MacMahon, own name who can shew he came regularly to the posses-  
J. sion of the bill.

In *Rex v. Randall*, R. & R. 195, where the prisoner was convicted of forging a bill of exchange it was held that the conviction could not be supported, the name of the payee having been left blank. See also *Rex v. Richards*, R. & R. 193, and *Regina v. McFee*, 13 O. R. 8, and the cases there cited.

There being no payee's name inserted in the instrument at the time it was uttered it was not a promissory note, and the defendant could not be lawfully convicted on indictment charging him with having forged the name of Mrs. D. Cormack to a promissory note, or with uttering it, knowing it to have been forged to a promissory note. For a like reason he could not be convicted with forging the name of Miss Mary Tomlinson on the back of a promissory note, or uttering it as a forged indorsement of a promissory note.

Then as to the second reservation made in the case by my learned brother Falconbridge as to whether the document is a note, writing, or instrument however designated, coming within the provisions of sections 46, 47 or 50, of the Forgery Act, R. S. C. ch. 165.

Section 46 reads: "Every one who for any purpose of fraud or deceit forges or fraudulently alters any document or thing written, printed, or otherwise made capable of being read, or offers, alters, disposes of, or puts off any such forged or altered document or thing knowing the same to be forged or altered is guilty of felony and liable to imprisonment for life."

In *Regina v. McFee*, 13 O. R. at p. 12, Cameron, C. J., referred to section 46, (then section 45 of 32 & 33 Vict. ch. 19), and said it was not clear what it was intended to cover; and while not reaching a definite conclusion it was evidently the inclination of his mind to hold that the clause only extends to forging by making a copy of some existing document or thing written or printed, and not to

forging a name to a document written properly as an original document. Judgment.

That this is the correct view is I think apparent, if the words "or fraudulently alters" are eliminated, when the section would read "every one who for any purpose of fraud or deceit \* \* forges any document or thing written, printed," etc., means a document then in existence which may be forged by being copied. Or if such document or thing written or printed is fraudulently altered then it is within the meaning of the section.

MacMahon,  
J.

Entertaining the view above expressed I do not consider that section 46 aids the indictment.

Section 47 merely provides that any person forging any instrument in writing designated in any Act, by any special description, and notwithstanding such special description such instrument is in law a will \* \* or a deed, bond, \* \* bill of exchange, or a promissory note, etc., may be indicted as an offender under that Act. That is, the instrument, however designated by special name or description, if its effect is in law to make it one of the instruments mentioned in the section, the person so forging such instrument shall be guilty of an offence under the forgery Act as if he had been charged and convicted of forging any of the instruments mentioned in the section.

The instrument set out in the indictment has no special name or description given to it by any Act, and is not in law any one of the instruments mentioned in section 47, and so does not come within the provisions of that section.

Section 50 has no application whatever to this case.

Mr. Cartwright founded an argument on the case of *Regina v. Williams*, 2 Den. 61, urging that it was an authority. holding that where the instrument charged to have been forged is set out in the indictment the mere misdescription in the designation of the instrument is immaterial. The head-note to the case is misleading; and in a foot-note to the American edition of the report the proper meaning or interpretation is given to the decision as follows: "The principle of this decision seems to be that where an instru-

Judgment.

MacMahon,  
J.

ment is described by several designations, and then set out according to its tenor, either with or without a *videlicet* the court will treat as surplusage such of the designations as seem to be misdescriptions, and treat as material only such designation as the tenor of the indictment shews to be applicable." Which means simply that if the instrument is set out in the indictment a misdescription will be immaterial if any of the terms used in the indictment in describing it be applicable.

There was only one term used in describing the instrument set out in the indictment against the defendant in this case, namely, "a promissory note," and that was not applicable as a description, so *Regina v. Williams* does not help us.

In *Regina v. Harper*, 7 Q. B. D. 78, where the prisoner was indicted and convicted of forging an indorsement to an instrument in the form of a bill of exchange but to which there was no drawer's name, it was held that the instrument being inchoate at the time of the forging of the alleged indorsement thereto the conviction could not stand.

In that case Mr. Justice Stephen said: "the act of the prisoner had all the effect of a forgery, punishable under the statute as a felony; the prisoner could, however, have been indicted and ought to have been indicted for forgery at common law."

So in this present case, there being no statutory felony committed, the defendant should have been indicted for a forgery as at common law.

The answers to the questions submitted with the reserved case must be that the instrument set out in the indictment is not a promissory note, and that the prisoner should not have been convicted on said indictment of forgery under any of the sections of the Forgery Act mentioned in the second question.

There will therefore be judgment quashing the conviction of the defendant.

GALT, C. J., and ROSE, J., concurred.

## [COMMON PLEAS DIVISION.]

## REGINA V. GULLY.

*Liquor License Act—R. S. O. ch. 194—Police Magistrate—Right to try county offences.*

The defendant was charged with a breach of "The Liquor License Act," in the township of Barton in the county of Wentworth; and was tried and convicted at the city of Hamilton situated in the said county, before the police magistrate thereof:—

*Held*, that under section 18 of the Police Magistrate's Act, R. S. O. ch. 72, the police magistrate had jurisdiction in the premises.

THIS was an appeal from an order of ROSE, J., refusing a *Statement certiorari*.

The defendant was convicted under section 50 of "The Liquor License Act," R. S. O. ch. 194, for keeping liquors for sale without a license.

The offence was charged as having been committed in the township of Barton in the county of Wentworth, and the trial and conviction took place at Hamilton before the police magistrate of that city.

In Easter Sitzings of the Divisional Court (composed of GALT, C. J., and MACMAHON, J.), May 23rd, 1891, *DuVernet*, supported the motion.

*Langton*, Q. C., contra.

June 27th, 1891. MACMAHON, J.:—

The only ground urged before us was that the offence having been committed outside the limits of the city of Hamilton, the police magistrate of that city had only the authority and jurisdiction of a single justice of the peace, and that it required two justices to hear and determine the offence of which the defendant was convicted.

Mr. DuVernet urged that because the authority conferred by "The Liquor License Act," R. S. O. (1877) ch. 181, sec. 68, on police magistrates in cities and towns to hear and determine any case in which the offence is alleged to



Judgment. have been committed, under the clauses of "The Liquor License Act," therein referred to (the offence of which the defendant was convicted being one of them) within any county (for judicial purposes) wherein such city or town is situated, has been eliminated from the R. S. O. (1887) ch. 194 sec. 96, corresponding with the above section 68 of R. S. O. 1877, that the authority to a police magistrate of a city had in such cases been repealed.

MacMahon,  
J.

But under the Police Magistrate's Act, R. S. O. (1887), ch. 72, sec. 18. "Every police magistrate shall, *ex officio*, be a justice of the peace" for the whole county or union of counties or district for which, or part of which he has been appointed. And by sec. 21, "Every police magistrate has power while acting anywhere within the county for which he is *ex officio* a justice of peace," to "do alone whatever is authorized, by any statute in force in this Province relating to matters within the legislative authority of the Legislature of the Province, to be done by two or more justices of the peace."

It is true that the above section 21 is also in the R. S. O. 1877, ch. 72, sec. 7 ; and there is no doubt the authority referred to contained in "The Liquor License Act," R. S. O. (1877) ch. 181, section 68 was eliminated when the revision took place in 1887 because the requisite authority was contained in the Police Magistrate's Act.

The appeal must be dismissed with costs.

GALT, C. J., concurred.

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## [COMMON PLEAS DIVISION.]

## PATTERSON V. McLEAN.

*Mortgage—Covenant by trustee to pay mortgage money improperly inserted in mortgage—Mortgagee restricted to foreclosure.*

Where a party holding land as a trustee, at the request of the beneficial owners, and without any consideration to him therefor or intention to become personally liable, for the benefit of such owners executed a mortgage on the land, the mortgage without his knowledge containing a covenant to pay the mortgage debt :—

*Held*, that the covenant was not enforceable against the mortgagor, personally, by the assignee of the mortgage for value without notice ; and that his remedy was restricted to foreclosure proceedings against the lands.

THIS was an appeal to a Divisional Court from the *Statement*. order of the Chief Justice of this Division dismissing with costs an appeal by the defendant McLean from an order made by the Master-in-Chambers dismissing with costs a motion by the said defendant to set aside judgment by default and for leave to appear and defend.

The action was by the assignee of a mortgage for foreclosure, and also for a personal remedy against the defendant on his covenant to pay the mortgage money contained in the mortgage.

In Easter Sittings of the Divisional Court (composed of ROSE and MACMAHON, JJ.), May 18th, 1891, *Howard* for appeal.

*Hansford* contra.

The authorities referred to sufficiently appear in the judgment.

June 27, 1891. ROSE, J.:—

The defence set up by McLean in substance was: that he held the land in question as trustee for the firm of McArthur, Smith & Co. ; and at their request, and, to enable them to more readily dispose of the land, he executed a

Judgment.

Rose, J.

mortgage thereon to a nominee of the firm, for the purpose of charging the land with the sum of \$540, without any intention on his part to become personally responsible for the payment of such sum and without any request on the part of the firm that he should so become responsible: that subsequently he conveyed the land to a purchaser from the firm subject to the mortgage: that the mortgage contained a covenant for payment of the mortgage money, of which fact he was ignorant at the time of executing it; and that, in fact, the act of the firm in obtaining his signature to the instrument charging him with personal liability was a breach of faith and practically a fraud: that he received nothing from the said firm or their nominee, the mortgagee, by way of consideration for the execution of the mortgage, but that the same was made and executed simply at the request and for the accommodation and convenience of the said firm, and to assist them in making a sale of the said land.

It is clear, so far, that if such facts were proven the mortgagee could not recover on the mortgage; but the plaintiff is the assignee of the mortgagee, and, as far as appears from the material before us, a purchaser for value without notice; that is to say, the contrary has not been made to appear.

It was urged on behalf of the plaintiff that the mortgage having been made, as admitted by the defendant McLean, for the purpose above set forth, he was estopped as against the assignee, who took the assignment as a purchaser for value without notice, from denying the truth of the statements therein contained, and the case of *Bickerton v. Walker*, 31 Ch. D. 151, was relied upon.

From a perusal of that case, and the cases therein referred to of *Hunter v. Walters*, L. R. 7 Ch. 75; *Re Natal Investment Co.*, L. R. 3 Ch. 355; *Athenæum Life Assurance Society v. Pooley*, 3 De. G. & J. 294; *Wright v. Leys*, 8 O. R. 88, 91, and especially *Davis v. Hawke*, 4 Gr. 394, I have come to the conclusion that, if the defendant

McLean can establish the facts as he states them, he has a good defence, not only as against the mortgagee but as against the assignee—that is a defence to a claim on the covenant.

Judgment.

Rose, J.

It is not disputed that it was intended by the defendant to establish a charge upon the land of \$540. The instrument was made and executed for such purpose, and therefore the assignee of the mortgage is entitled to recover out of the land such sum. But the covenant is quite an independent matter. Admitting that by virtue of the mortgage and the provisions therein contained, the mortgagor is estopped as against the assignee from disputing that he had received the consideration money in the mortgage (I do not say how this is, for it is said that the mortgage had no receipt clause endorsed thereon, and so the case is distinguished from *Bickerton v. Walker*), still, that does not establish that he is estopped from denying that he was liable upon the covenant to pay such sum. The instrument, as charging a debt upon the land, is quite distinct from the covenant to pay. The covenant to pay is merely a chose in action and the assignee takes it subject to the equities existing between the mortgagor and the mortgagee. This was distinctly held in *Davis v. Hawke*, 4 Gr. 394. Prior to the statute permitting the assignee to bring the action in his own name the action would necessarily have been brought in the name of the mortgagee, and the statute permitting the action to be brought in the name of the assignee leaves the law, as to the equities existing between the parties and the right to set them up, as it was prior to the passing of the Act. If, therefore, the defendant has made out a case for being let in to defend, I think he has set up a state of facts which affords a defence, or perhaps it is sufficient to say, without committing myself further, that he has set up such a defence as ought to be further considered.

MACMAHON, J., concurred.



## [COMMON PLEAS DIVISION.]

## ESSERY V. THE GRAND TRUNK RAILWAY COMPANY.

*Railways and Railway Companies—Compensation for land taken—Right to, after disposal of land—Statute of Limitations.*

Where there is a right to compensation against a railway company for lands taken for railway purposes, such land forming part of lands owned by a party, the conveying away of the whole of said lands, does not of itself carry the right to the compensation.

The right to compensation is not barred until the expiration of twenty years from the time the land is entered upon and taken for the railway purposes.

*Ross v. Grand Trunk R. W. Co.*, 10 O. R. 447, followed.

## Statement.

THIS action was tried before STREET, J., without a jury, at St. Thomas, at the Spring Assizes of 1890.

The evidence shewed that one John Hurdle died on 13th March, 1872, seized in fee of lots 10 and 11 in the second concession of Mosa in the county of Middlesex. By his will he made a disposition of his personal estate only; and the lands in question descended to his only legitimate child Rowena Hurdle, subject to the dower of his widow Jane Essery, the plaintiff in this action.

About a year after the death of John Hurdle, the Great Western Railway Company, under their powers, became entitled to expropriate a part of these lands in order to build a double track to their line of railway at that point. They accordingly entered upon, and took, and fenced in between three and four acres of the lots in question, and built their track upon the parcel so taken. No leave was obtained from the owners, no arbitration proceedings took place, no order for right to enter was made, and no compensation had been paid to any person for the lands taken. Application had been made without success to the Great Western Railway Company, and to its successors the defendants, for the payment of compensation at various times since the land was taken. Rowena Hurdle died in 1881, being then about fourteen years of age, leaving her mother, the plaintiff, her sole heiress-at-law.

This action was brought by the plaintiff asking that a Statement. writ of mandamus might issue ordering the defendants to take the necessary proceedings to determine the compensation to be paid by the defendants for the lands taken.

The defendants denied the plaintiff's title, and alleged that she had conveyed away any title she might have had; and they set up the Statute [of Limitations as a defence.

March 22, 1891. STREET, J.:—

The law appears to have been settled in *Ross v. Grand Trunk R. W. Co.*, 10 O. R. 447, that under circumstances which are not to be distinguished from those in the present case, the person whose land has been taken for railway purposes has a statutory right to compensation which is not barred until the expiration of twenty years from the time the land is entered upon and taken for railway purposes.

This action is brought within this period of twenty years, and objection founded on the Statute of Limitations cannot therefore prevail.

The Railway Act, R. S. C. ch. 109, sec. 8, sub-sec. 32, provides that "The compensation for any lands which may be taken without the consent of the proprietor, shall stand in the stead of such lands; and any claim to or incumbrance upon the said lands, or any portion thereof, shall, as against the company, be converted into claim to the compensation."

The meaning of this I understand to be that the claim to the land is converted into a claim for the compensation: that the compensation retained its character of real estate and descended to the heir-at-law, and did not go to the personal representative of Rowena Hurdle. The plaintiff has never made any conveyance of the compensation or her claim to it. She has conveyed away the whole lot of land of which the portion taken by the railway forms a part, but I do not understand that the effect of her doing so is

Judgment. to convey also the right to compensation which right  
Street, J. formed no part of the land she conveyed. See *Young v. Midland R. W. Co.*, 16 O. R. 738.

To hold otherwise would it appears to me be inconsistent with the principle upon which *Ross v. Grand Trunk R. W. Co.*, above referred to, was decided. In that case it was held, that although the plaintiff's right to the land was barred by the Statute of Limitations, the right to the compensation remained, and was not barred. How then could it be held that the right to recover the compensation follows the title to the land?

I am of opinion therefore, that the plaintiff is entitled to the mandamus asked for. If the defendants consent to a reference to a master, then instead of a mandamus there will be a reference to the Local Master of the Supreme Court of Judicature for Ontario, at London, similar in its terms to that described in *Ross v. Grand Trunk R. W. Co.*

The plaintiff is entitled to her costs of the motion. If a reference is agreed to, then further directions and costs of the reference will be reserved until after the report.

A motion was made by the defendants to the Divisional Court to set aside the judgment entered for the plaintiff and to enter judgment for the defendants which was argued on the 23rd May, 1891, by *Aylesworth*, Q. C., for the motion, and *McLeish* contra.

The case stood for judgment, and was subsequently settled by the parties.

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## [QUEEN'S BENCH DIVISION.]

## ELLIS V. CLEMENS.

*Waters and water-courses—Riparian proprietors—User of stream—Reasonable user—Prescriptive right—Maintenance of dam for twenty years—Changed conditions—Right of action.*

Riparian proprietors are entitled to make a reasonable use of the water of a stream, to detain it and retard it within certain limits; but any user which inflicts positive, repeated, and sensible injury upon a proprietor above or below is not to be considered reasonable.

And where the defendant and his predecessor, by discontinuing the use of the water during the hard frosts, although at a loss to themselves, might have prevented the damage complained of by the plaintiff, but did not so discontinue though requested to do so by the plaintiff:—

*Held*, that they were making an unreasonable use of the water and were liable for the damage done.

The fact that the defendant and his predecessors had maintained their dam, mill, and race-way in the same position for upwards of forty years, and had during all that time used the water as the necessity of their business required, did not give the defendant a right to use the water to the prejudice of the plaintiff; the defendant could not insist that he had gained a prescriptive right to injure the plaintiff without proving that he and his predecessors had for twenty years been making an unreasonable use of the water, to the injury of the plaintiff; the use which had formerly been reasonable becoming unreasonable because of changed conditions, within twenty years there arose for the first time a grievance which gave the plaintiff a right to complain, and he was not barred of that right by reason of his making no complaint until he began to be injured.

THIS action was tried before STREET, J., at the Autumn Statement.  
Assizes at Guelph, on 29th October, 1889. Argument was postponed at the request of counsel, and only took place on 24th June, 1891, at Osgoode Hall.

*W. R. Meredith, Q.C.*, and *E. P. Clement*, for the plaintiff.  
*Moss, Q.C.*, and *Alexander Millar, Q.C.*, for the defendant.

The facts are stated in the judgment.

July 28, 1891. STREET, J.:—

The plaintiff is the owner of part of lot 10 in the second concession in the lower block of Waterloo, through which a small natural stream of water flows. Upon this stream, a short distance above the boundary of the plaintiff's land, the defendant's predecessors in title had, prior to the year



Judgment. 1855, erected a dam and built a mill run by the power of the stream through a race-way in the ordinary manner. The water diverted through the race was returned to the bed of the stream before it left the defendant's land. Down to the year 1864 there appear to have been three run of stones in the mill; at some later period another was added as a spare stone, to be used when any one of the others was being repaired; and there was also apparently, before the year 1870, a stone used for cutting feed. Steam-power was put in in 1874 or 1875 to aid the water-power, and the roller process was put in in the winter of 1883-4. The plaintiff complains that in the year 1883, and from thence continually down to 21st March, 1888, one Aaron Clemens, then the owner of the mill, penned the water back by his dam and race-ways and allowed it from time to time to escape in such small quantities that in the winter it became frozen in layers solidly from the bottom of the bed of the stream on the plaintiff's land to the top, and that the water in the spring, being unable to escape through the channel, by reason of the solid ice which filled it, spread over the plaintiff's land and destroyed his crops; that Aaron Clemens died 21st March, 1888, and the defendant David S. Clemens is his administrator; that the defendant, David S. Clemens, carried on the same milling business since his father's death, and dealt with the water in the same way as Aaron Clemens had done, and caused similar damage; and the plaintiff claims \$1,200 damages and a perpetual injunction.

The defendant admits that he and his predecessors in title have since the year 1842 maintained the dam and mill, and claims a prescriptive right to do so; he alleges that the use of the water by him and his predecessors has been lawful and reasonable and for a beneficial purpose, and he denies that any damage was caused to the defendant. The writ was issued on 2nd March, 1889.

The evidence at the trial has led me to the conclusion that the plaintiff has suffered some damage to his crops caused by the working of the defendant's mill, but that a

good deal of the damage of which he complains has been caused, not by the overflowing of the creek, but by the backing up of the water in the river Speed, into which the creek in question runs. The question is whether the defendant can be made liable for the portion of the damage which has been caused by the working of his mill.

Judgment.  
Street, J.

I have no hesitation in finding that the defendant and his predecessors in title have not acted at any time maliciously or vexatiously; that they have not at any time unnecessarily withheld or discharged the water of the stream, nor detained it longer than was necessary for the reasonable and ordinary purposes of their business as millers. But the stream is a small one, and the clearing up of the country has had the usual effect of increasing the quantity of water in the spring and decreasing it during the summer and winter months. In consequence of this the mill-owners, in order to obtain a sufficient head of water, have had at times to stop the flow of the stream entirely, thus drying its bed below the mill. When the water was again let on it came slowly and in small quantities, and in severe winter weather froze to the bed of the stream, and being again shut off and let on gradually filled the bed to the top of its banks with a solid mass of ice. In the spring, when the freshets came, the water, being unable to escape by its proper channel, overflowed the plaintiff's crops and did some damage which would not have been done had the stream been unchecked by the dam. These facts were more than once called to the attention of the defendant and his predecessor, but they took the ground that they were entitled to make use of the water at all times for the purposes of their business, without regard to the effect upon the plaintiff. I think, apart from any question of prescription, that they were not entitled to take this position. As riparian proprietors they were entitled to make a reasonable use of the water, to detain it and to retard it within certain limits. What is a reasonable use, and what are the limits of their right to detain and retard it, are questions of fact which must be determined by

Judgment.

Street, J.

reference to the surrounding circumstances; and the general rule which I gather from the cases is that any user which inflicts positive, repeated, and sensible injury upon a proprietor above or below is not to be considered a reasonable user. In the present case the defendant and his predecessor by acceding to the plaintiff's request that they should not, during the hard frosts, make use of the water, might have prevented the damage complained of. It is true that by doing so they would have incurred some loss, for their mill would have been occasionally idle; but they would have avoided the damage they have done to the plaintiff by following the opposite course. It was a question whether they should incur a certain loss, themselves, or run the risk of inflicting loss upon the plaintiff, and they preferred the latter alternative. In doing so I think they must, under the cases, be held to have been making an unreasonable use of the water, and that they must pay for the damage which has been done: *Tyler v. Wilkinson*, 4 Mason at p. 401; *Miner v. Gilmour*, 12 Moo. P.C. at p. 156; *Embrey v. Owen*, 6 Ex. at p. 367; *Orr Ewing v. Colquhoun*, 2 App. Cas. at p. 855; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Webb v. Portland Manufacturing Co.*, 3 Sumner 189, at p. 200; *Dickson v. Carnegie*, 1 O. R. 110; *Cowles v. Kidder*, 4 Foster (New Hampshire) 364; *Earl of Sandwich v. Great Northern R. W. Co.*, 10 Ch. D. at p. 710; *Gale on Easements*, 6th ed., 215 to 220; 3 Kent's Comm., 12th ed., 439 to 442; *Wood v. Waud*, 3 Ex. 748, 774; *Kensit v. Great Eastern R. W. Co.*, 27 Ch. D. 122; *Merritt v. Brinkerhoff*, 17 Johns. 306.

The defendant claims, however, a prescriptive right to make use of the stream as he has done, and, if necessary, to the prejudice of the plaintiff, and I think he has established that for upwards of forty years he and his predecessors have maintained the present dam and mill and race-way as they at present stand, and that they have during all that time used the water of the stream by damming it, detaining it, and retarding it from time to time as the necessity of their business required. Nor do I think

that the flow of the water was materially varied by the addition of a stone, for that was only used when one of the others was being repaired; nor by the introduction of steam-power, for that was only used when there was no water. But it is necessary to see what is the grievance which is complained of; it is not that the defendant has erected a dam and a mill and race-way, but that the defendant and his predecessors have in 1884 and the subsequent years so used the dam and mill as to cause damage to the plaintiff. Whilst plenty of water came down the stream at all seasons of the year no damage was done to the plaintiff, and he could not complain, because, under the then existing circumstances, the user by the defendant's predecessors was reasonable. The circumstances, however, changed; more water came down the stream than before at one season, less at other seasons, and the result was that the user which had formerly been reasonable became unreasonable because of the changed conditions, and then for the first time there was a grievance which gave the plaintiff a right to complain. The defendant cannot insist that he has gained a prescriptive right to injure the plaintiff, without proving that he and his predecessors have for twenty years pursued the course which they are now pursuing to the injury of the plaintiff. All they have shewn is that they have used the water during all that period as their business demanded; but the state of the water in the earlier portion of the period enabled them to carry on their business without injuring the plaintiff; in later years it did not do so, and the plaintiff, for the first time finding himself injured, is not barred of his right to complain by reason of the fact that he made no complaint until he began to be injured: *Sturges v. Bridgman*, 11 Ch. D. 852; *McKechnie v. McKeyes*, 9 U. C. R. 563; same case, 10 U. C. R. 37; *Hunt v. Hespeler*, 6 C. P. 269; *Bechtel v. Street*, 20 U. C. R. 15. *Bechtel*

Judgment.  
Street, J.

An injunction was asked for, but I do not think this is a case in which it would be useful to grant one. The rights of the parties being ascertained, there should be no difficulty



Judgment. in their acting upon them, so that further litigation should  
Street, J. be unnecessary. If the plaintiff's rights are again infringed upon, it will be more satisfactory and no more expensive that the facts should be shewn by *vivâ voce* testimony than by the tedious, expensive, and unsatisfactory method of affidavit and depositions upon a motion to commit, there being no specific acts which the defendant could be restrained from committing.

The parties agreed upon the trial that in case I should find the plaintiff entitled to damages there should be a reference to ascertain them, and I order a reference accordingly. The costs of the reference should be reserved, in order that the defendant may avoid the necessity for one by offering to pay a sufficient sum to cover the damages sustained by the plaintiff. Should such a sum be offered and rejected, the plaintiff, and not the defendant, should pay the costs of the reference.

The costs to judgment must be paid by the defendant, after taxation.

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## [CHANCERY DIVISION.]

## BAIN V. ÆTNA LIFE INSURANCE COMPANY.

*Life insurance*—"Divisible surplus"—"Divisible profits"—*Discretion of directors of company to retain profits to provide for contingencies.*

On an appeal to the Divisional Court, the judgment of FALCONBRIDGE, J., reported 20 O. R. p. 6, was affirmed.

*Per* BOYD, C.—The representation made that participating policies "would receive their equitable share of the divisible surplus" points to the exercise of the discretion of the managers of the company, and the expression "divisible surplus" is one that refers to something less than the entire profits claimed by the plaintiff. Before divisible profits can be ascertained it would seem to be essential for the security of policy-holders to keep such resources in hand as would cover the whole liabilities of the company, having regard to the uncertain chances of mortality, rate of interest, expenses, etc.

*Per* MEREDITH, J.—There is no express covenant in the policy to pay the plaintiff any profits. "Divisible profits" are the profits which the company, after making, in good faith, all reasonable and proper provision for its safety and prosperity, divide among policy holders.

THIS was an appeal to the Divisional Court from the *Statement*. judgment of FALCONBRIDGE, J., reported 20 O. R. 6, and was argued on March 6th and 7th, 1891, before BOYD C., and ROBERTSON and MEREDITH, JJ.

*Bain*, Q. C., and *Laidlaw*, Q. C., for the appeal. The representation by the defendants was that all the surplus of profits should be divided among the participating policy holders. The evidence shows that for some years they divided what they said was all the profits; but the president's letter admitted that the whole profits were not divided, and promised that when the policy matured, the whole of the profits would be divided. This was not done, but the capital has been increased by a large sum out of profits which should have been divided. A participating policy-holder is entitled to a share of the profits under his contract, not to a share of what the directors consider profits. *Re English and Irish Church and University Assurance Society*, 1 H. & M. 84, does not apply to this case. *Manby v. The Gresham Life Ins. Co.*, 7 Jur. N. S. 383, was only a case where the court would

Argument. not interfere with a discretion of the directors, which both parties had left with them. Here there was no discretion reserved. As to what are profits, see *Last v. The London Assurance Corporation*, 10 App. Cas. 438; *The New York Life Assurance Co. v. Styles*, 14 App. Cas. 381.

*S. H. Blake*, Q. C., contra. The facts are shown in the judgment of the trial judge. Every year of time adds to the liabilities of the company on account of the increase of a year in the age of the policy-holders. The evidence shows the company's position in that respect was not as good at the end of the plaintiff's policy, as it was at the beginning. There is a great difference between net profits and gross profits, and between net surplus and gross surplus. In *Last v. The London Assurance Corporation*, 10 App. Cas. 438, a specific quantity, two-thirds was settled upon, and that fixed the amount; but no sum was set apart here and no fraud is charged. The president's letter makes no difference. He had no power to alter the contract, and even if he had, there was no consideration. He said the balance retained would be paid when the policy was paid or sooner, and it was paid before the policy matured by an increase in the rate of payment of divisible profits. Certain sums are not profits because they are called profits in the papers of the company. The plaintiff is only entitled to a proportion of the earnings: *New York Life Assurance Co. v. Styles*, 14 App. Cas. at p. 392. In *Henderson v. Bank of Australasia*, 40 Ch. D. at p. 178; *Attorney-General v. Great Eastern R. W. Co.*, is quoted from showing approval of the exercise of the directors' discretion. I also refer to *Fuller v. Knapp*, 24 Fed. Rep. at 104; *Luling v. Atlantic Mutual Ins. Co.*, 45 Barb. at p. 515.

*Maclaren*, Q. C., on same side. The evidence of the plaintiff does not shew that he was induced to insure on any representation shewing what profits he was to participate in. See *Uhlman v. The New York Life Ins. Co.*, 109 N. Y. R. at p. 432.

*Bain*, Q. C., in reply. The whole question is, what was my contract? The *Uhlman Case* is in my favour.

I do not ask for an account of how the surplus has been made up. All I ask for is my share of the company's admitted surplus. The defendants have argued the case as if the company had paid all they admit before action. The evidence shews that the defendants refused to pay anything before action except upon the condition of delivering up my policy and renewal receipts. The action had to be brought, and then the admitted amount was paid into Court. In any event up to that time I should get all my costs. See *Paterson v. Powell*, 9 Bing. 320; *Dalby v. The India and London Life Assurance Co.*, 15 C. B. 365; Porter's Laws of Insurance, 2nd ed., p. 390. Argument.

September 5th, 1891. BOYD, C. :—

The plaintiff's contention as made in his evidence is that he understood a participating policy gave the right to participate in the whole of the profits made each year in the business of the company. Later on he says: "Whatever the policy gave me under the participating system I suppose I was to take." This marks what would be indeed the reasonable inference that only such profits as were attributable to the participating branch should be taken into consideration as divisible.

Statements were rendered yearly shewing dividends apportioned to the policy-holder in reduction of his annual payments; but it appears he had an expectation based on the letter of the president of 1876 that there would be a further deduction and allowance of accumulated profits at the end of the endowment term.

When he became a policy-holder he knew that the company advertised a surplus of about a million and a-half dollars. At the end of the endowment term in 1889, they had such a surplus of over three and a-half millions. On the other hand the increase of liabilities between the two periods 1868-1889, was from six to twenty-three million dollars. So that relatively the surplus thus manifested was less at the end than at the beginning of the plaintiff's policy.



Judgment.

Boyd, C.

It appears that the plaintiff has received dividends which have been derived (in part) from this surplus on hand when he took his policy. In 1874 the company made a change in the manner of distributing the surplus from the percentage plan to the contribution plan, which from its obvious justice was adopted generally by insurance companies. By the former plan a simple percentage was paid on the premiums by which as much would be allotted to a policy-holder of one year's standing as to one who had been paying for many years: by the latter plan the dividends were regulated by the total amounts paid into the company by the different policy-holders, so that he who had in the aggregate paid most should receive correspondingly. I do not understand that this change affected the totals annually divided as surplus or profits, but only the manner of their distribution. It has been held, however, that such a change it is competent for a company to make: *Bruce v. Continental Life Ins. Co.*, 58 Vt. 260 (1885).

But the main question now is: What is the surplus which is to be divided? Who ascertains it? Who controls it? The company's witness, English, says "the term surplus is simply deducting the liabilities from the assets." "The principal liability is what is called the policy liability on the reserve, and that is calculated upon certain estimates of mortality and interest—the interest rate being four per cent., and assuming that compounded." He says again, "these liabilities are calculated on a theoretical basis; and it is considered desirable and necessary by the managers to retain besides, some excess over this technical liability, and it is retained." He points out that one element of uncertainty is the rate of mortality which may be larger than given in the tables, and that the liability increases as the company is of longer standing and the policy-holders become older and the chances of death greater. This same witness examined under commission said, "In life insurance business the liabilities are determined upon a purely theoretical basis; no one knows whether

the amount that is entered as the legal reserve which is the principal part of our liability, whether that is the actual liability that may be experienced in carrying out the contracts that have already been undertaken, but being as good a general idea of it as we know how to obtain, it is looked upon as the liability, and the surplus growing out of these figures is therefore a theoretical surplus. More or less of it may be needed to carry out the contracts; we cannot determine how much; it is a possible surplus rather than actual." He then shews that in the participating department on 1st January, 1868, the percentage of surplus was twenty-five per cent. of the liabilities of that time, and upon the same basis the percentage on the 1st January, 1889, was only fifteen per cent. of the liabilities. This decrease has arisen from the payment of dividends to the plaintiff and other participating policy-holders during that period.

Judgment.

Boyd, C.

He also says "the nominal surplus in the participating department is held to provide for possible contingencies in the business. A portion of it from year to year is set apart by the directors to be paid in dividends to policy-holders." The reserve fund, as explained by Mr. St. John, is composed of a sum which represents the net value of the policies computed upon mathematical methods plus some approximate estimate made by the directors for contingencies over and above the computed amount; out of the profits dividends are made to such an extent as in the opinion of the actuary will guard against an over-division of the surplus having regard to the solvency and life of the company.

In other words the portion of the annual surplus not divided represents such a reserve, as is deemed requisite to ensure the stability and solvency of the concern according to the established usage of insurance companies; and having regard to the future of the business. And the representation made in the publications of the company contemporaneous with this policy was that participating policies would "receive their equitable proportion of the

Judgment.

Boyd, C.

divisible surplus." I think these words point to the exercise of the discretion of the managers of the company and that the expression "divisible surplus" is one that refers to something less than the entire profits now claimed by the plaintiff. *Primâ facie* what has been done by the directors in the way of division is right, as they are supposed to know their own business.

This position in the present case rests not merely on presumption, but upon the actual returns made to the insured, and the exhibition of the now relatively diminished state of the surplus as compared with its state when the policy was taken.

Assuming, as I do, fair dealing in the apportionment made, it is for the plaintiff by pleading and evidence to attack that specifically as being erroneous in fact or in law. He is not concluded by the action of the company, but he cannot have an account by merely asking for it or by showing that all the so-called surplus has not been divided. The directors proceeded upon the report of their actuary, who for some fifteen years has gone to work in the same way to ascertain divisible profits, and the Court will not lightly act as a supervisory tribunal upon results thus arrived at: *In re County Marine Insurance Co., Rance's Case*, L. R. 6 Ch. 104.

The amount to be apportioned depends upon the extent of the reserve, which it is thought advisable to keep beyond the requirements of the government officer. The contract of insurance is of a vague character, as to the division of profits, and for this very reason such a construction is to be given to it as will promote and not frustrate the objects of the undertaking.

The directors in *Rance's Case*, did what was suggested as the measure of the plaintiff's rights here. The directors had before them the cash balance of the receipts and payments, and without making the slightest provision for future risks, proceeded to treat the balance as divisible profits, but the Lord Justice James characterized it as the most extravagant proceeding he had ever heard of. See

per Lord Herschell in *New York Life Ins. Co. v. Styles*, 14 App. Cas. at p. 411. Judgment.  
Boyd, C.

Before the point of divisible profits can be reached, it would seem to be essential for the well-being of the company as a going concern, and in order to furnish an ample margin for the security of policy-holders, to accumulate and keep such resources in hand as will cover the whole liabilities of the company, having regard to the uncertain chances of mortality, the fluctuations in the rate of interest on securities and re-investments, and the amount of expenses likely to be incurred in the future. On these and kindred points assumptions have to be made; and if there must be inherently a want of exactitude as to the actual outcome compared with the calculations, any variation had better be on the side of excess than of deficiency, so as to be well within the limits of safety. There seems to be no other practicable way wherein to adjust these elements of uncertainty, which vary with each year of a life insurance business, than to ascertain the divisible profits by means of competent actuarial computation.

The results thus obtained will, as a rule, bind as to the distribution or apportionment of profits, and the Court, in the absence of special circumstances, will be loath to interfere. Upon procuring his policy, the plaintiff must be taken, in my judgment, to have assented to this manner of conducting the business of the company, and he is not shown to have suffered because of any statements apparently of a different tendency contained in the president's letter of 1876. The evidence, however, is, that the terms of that letter have been satisfied by the increase of yearly dividends, which were made thereafter upon a more liberal basis for the participating policy-holders.

I have not adverted to other aspects of this matter which are not, however, without pertinence. The difficulty of conducting business if these companies were to be open to attack by those claiming to share in the profits; the absence of any decisions giving such general right of inves-



Judgment.    tigation; the competition existing in these enterprises  
Boyd, C.    which will incite companies to divide as large an amount  
as possible, consistent with the stability of the undertaking;  
the ready means at hand to rectify any excess of caution  
through retaining in one year more surplus than is  
needed for the next year's business, by treating that excess  
as profits divisible at the end of that year: considerations  
such as these suggest that the interference of the Court  
would be harmful under ordinary circumstances, and that  
the divisible profits of a going concern are of a fluctuating  
character, which can be better gauged by the experienced  
and well-advised management than by such adjustments  
as might be directed upon the winding up of a company.

I have reached the conclusion that no ground appears  
which would justify our disturbing the judgment already  
given.

MEREDITH, J. :—

The plaintiff disavows any claim to control the exercise  
of any discretion resting in the directors, or intention to  
charge them with bad faith, or even want of good judgment,  
in their dealings with the assets, or their management,  
otherwise, of the affairs of the company; so that  
much that was urged upon us so exhaustively was not  
material.

The claim, as the plaintiff made it before us, seems to  
me very intelligible and simple. He says that the defendants  
contracted with him, to allot to him, each year, a share  
of the whole profits of the concern; and, that—as they  
admit—they have not done so.

If such were the contract, the plaintiff is surely entitled  
to relief; no action on the part of the directors can  
deprive him of his rights, or relieve the company from  
their obligation: the various considerations urged in the  
company's behalf, however urgent and important to the  
company, and though material in arriving at what the  
contract really was, cannot be an answer to such a claim.

So that, in my opinion, the sole question for determi-

nation in this case is, what was the contract? Was it, Judgment. as the plaintiff claims, that each year in which there Meredith, J. were profits, he was to be allotted a fair share of the whole of them, so that no portion could be withdrawn to form a fund to meet possible losses, that could not be accurately provided for, and other contingencies, and a reserve fund to strengthen and increase the business profits and prosperity of the company; and that in case of loss in any year he was not to bear any portion of it, nor was any other provision made for meeting it?

The policy does not help the plaintiff's contention. There is no express covenant in it to allot or pay to the plaintiff any profits at all, and it only indirectly shows the plaintiff's right to participate in them. No doubt it was purposely so written by the company; and the plaintiff is at fault for not objecting to the form of it, if his understanding of the agreement were then what he now contends for. But reading all that is contained in the tables of rates into the policy and giving the plaintiff, whether so entitled or not, the full benefit of them as if part of the contract; See *Hodgins v. Ontario Loan and Debenture Co.*, 7 A. R. 202; and *Rosenberg v. Northumberland Building Society*, 22 Q. B. D. 373; I am unable to extract the meaning the plaintiff contends for. Why must "profits" mean the whole profits? Why not net profits, see *Bond v. Pittard*, 3 M. & W. 357, per Parke, B., at p. 360? or "divisible profits"?

Profits are the net gains or earnings: and the terms "gross" and "net" profits are often inaccurately used for the gross or net gains or earnings: though the terms "gross" and "net" profits may be properly applied where, as in this case, out of the whole profits certain payments or deductions are to be made, and what remains only to be treated as profits to be divided, "divisible" profits or surplus as ordinarily termed by insurance companies.

Looking at such of the surrounding circumstances as one must, and reading the writings in the light of them, I am of opinion that the bargain was to allot and pay to the plaintiff a fair and equal share with other like policy-

Judgment. holders, of the "*divisible profits*" of the concern; that is, Meredith, J. the profits which the company might, after making, in good faith, all reasonable and proper provision for its safety and prosperity, divide among policy-holders.

I cannot believe that any insurance company would engage in business upon the disastrous plan that the plaintiff contends for, nor, if they did, that the plaintiff would have embarked in so risky a concern; have been so unwise as to take a policy in a company so foolishly conducted. And, besides all this, the reserve fund, accumulated from profits not divided and allotted among policy holders, existed, to the plaintiff's knowledge, when he became a policy-holder, and then bore a greater proportion to the liability of the company to policy-holders than it now does; and indeed is out of the fund in which the plaintiff now claims to be entitled to share—that fund so accumulated being the main ground of the plaintiff's attack upon the company.

In my judgment the plaintiff failed to establish his claim, and on that ground the action was properly, and this motion should be, dismissed. But if the action had been tried before me I would probably have dismissed it without costs, because I cannot but feel that the company are in a measure blamable for this litigation. The form of their policy, the many differing terms of expression as to profits contained in the various tables of rates put in at the trial, and the letter of the president of the company, so much relied upon by the plaintiff, were not best calculated to avoid disputes and litigation even if not calculated to invite them and it. Why should not the form of policy of any company set out fully and clearly the contract intended to be entered into?

As the action was dismissed with costs, this motion may perhaps be fairly dismissed without costs, and I would so dismiss it.

ROBERTSON, J., concurred.

BOYD, C.—I concur with my brother Meredith in the disposition of the costs.

## [QUEEN'S BENCH DIVISION.]

## RE DAVIS ET AL. AND THE CITY OF TORONTO.

*Municipal corporations—By-law—Construction of sewer—Acquiring easement—R. S. O. ch. 184, sec. 479, sub-sec. 15.—Quashing by-law—Acting upon by-law—Estoppel—Notice to appoint arbitrator—Costs.*

Section 479, sub-sec. 15, of the Municipal Act, R. S. O. ch. 184, which gives power to a municipal corporation to pass by-laws “ \* \* \* for entering upon, breaking up, taking or using any land \* \* ” for drainage purposes, does not authorize a by-law which, while not assuming to take land required for the purpose of a sewer, attempts to expropriate the easement for the construction thereof.

52 Vic. ch. 73, sec. 11, (O.), does not provide for the compulsory acquisition of such an easement.

The sewer in question was part of a system, but the upper end thereof, and not an outlet for any part already constructed :—

*Held*, that no money having been spent under the by-law, it had not been so acted upon as to prevent its being quashed.

The applicants for an order quashing the by-law before moving had appeared on a notice, given by them, to name an arbitrator, before a Judge, who raised the objection to the by-law above referred to, whereupon the applicants gave notice of abandonment :—

*Held*, that the applicants were not estopped, but that they should have no costs.

A MOTION by David Davis and Nathaniel H. Davis for *Statement*.  
an order quashing by-law No. 2489, providing for the construction of the north-west branch of the Garrison Creek sewer in the city of Toronto, and by-law No. 2756, amending the same, passed by the municipal council of the city of Toronto. The applicants were the owners of lands through which it was proposed that the sewer should pass.

The grounds of the motion and the facts connected therewith are fully stated in the judgment.

The motion was argued before FALCONBRIDGE, J., in Court, on the 3rd March, 1891.

*James Pearson*, for the motion.

*Biggar*, Q. C., *contra*.

September 2, 1891. FALCONBRIDGE, J. :—

The determination of this case was indefinitely postponed after the argument in consequence of an intimation from



Judgment. counsel that there was a chance of settlement between the Falconbridge, parties.

J.

It is a motion to quash by-law No. 2489, providing for the construction of the north-west branch of the Garrison Creek sewer, and by-law 2756, amending the same.

It is only necessary to consider by-law 2489; by-law 2756 simply authorizes a deviation from the original line of the sewer.

Following are the grounds of the motion :

That the provisions of by-law No. 2489, as amended by by-law No. 2756, exceed the powers and authority conferred on the corporation of the city of Toronto by the Municipal Act of the Province of Ontario in the following respects, among others :—

1. That by-law No. 2489 assumes to take to the corporation and also to give to its employees the right to enter upon private property and construct the sewer thereon without expropriating or otherwise acquiring the lands requisite for the site or location of the sewer.

2. The by-law assumes to expropriate an easement, while the corporation has no power to do so.

3. Even if the corporation has the power to expropriate an easement, the entering upon private property and constructing and maintaining a sewer thereon is not an easement.

4. Sections 4, 6, 7, and 8 of the by-law assume to exercise a much wider control over private owners of property with regard to building restrictions than is authorized under any of the provisions of the Municipal Act.

5. By-law No. 2489 ought to be quashed by reason of the vagueness of its provisions as to the rights sought to be acquired thereunder by the corporation.

The by-law (2489) in question provides (sec. 1) that a brick sewer of certain dimensions shall be constructed, from Ossington avenue to Bloor street along a centre line specifically described.

Sections 2 and 3 are as follows :

“2. For the purpose of the construction of the said sewer

the corporation of the said city of Toronto and its officers, servants, and agents may enter upon and use and occupy with horses, carts, ploughs, scrapers, and all other necessary plant, machinery, vehicles, tools, and materials, the lands lying within twenty-five feet on either side of the centre line of the said sewer, as above described.

Judgment.  
Falconbridge,  
J.

3. After the said sewer has been constructed, the said corporation and its officers, servants, and agents may from time to time and at all times have a right to enter in and under and (so far as the same is not otherwise occupied) upon a strip of land having a width of eight feet on each side of the centre line of the said sewer, as the same has been actually constructed, for the purpose of opening, altering, inspecting, repairing, or reconstructing the said sewer, or for any other lawful purpose."

These sections do not assume to take or expropriate land or any interest in land, but assume to confer right of entry on the city and its servants, for all time.

Section 4 is as follows :

"4. The owners of the land through which the said sewer is constructed may fill up the land over the said sewer, or within the space of eight feet on each side of the centre line thereof, and may build upon and over the same, provided such filling up or building be so done as not to injure or be dangerous to the said sewer; but no person shall put up, repair, alter, or maintain any building or erection on the said strip of land unless and until the plans and detailed drawings therefor shall first have been submitted and approved of in writing by the city engineer, and no deviations from said plans and drawings shall be made without the written approval of the city engineer for the time being."

This section limits and prohibits the owner from exercising, except under the uncontrolled supervision and approval of the city engineer, the ordinary rights of ownership over his own land.

Section 5 is as follows :

"5. The construction of the said sewer shall not be com-

Judgment.  
Falconbridge,  
J.

menced unless and until the aforesaid easement required for the construction thereof through the lands hereinbefore described shall have been acquired by and vested in the corporation of the city of Toronto, by conveyance from the owners of said lands to the said corporation, at a price to be agreed upon between the said owners and the said corporation, or (in case of disagreement between the said parties) to be determined by arbitration pursuant to the Municipal Act, and any Acts amending the same, and in such last mentioned case unless and until the award or awards determining the value of the said easement shall have been adopted by the said corporation by by-law, as provided for in the said statutes, and in case the said price, together with the estimated cost of constructing the said sewer, exceeds the sum of \$60,000, the construction of the said sewer shall not be proceeded with under this by-law."

This assumes that the corporation has the right to expropriate the easement, and to determine the price thereof by arbitration under the provisions of the Municipal Act.

Sections 6, 7, and 8 assume to make provisions by way of penalty and removal of buildings, etc., erected, in breach of the provisions of the by-law; and these sections are, like section 4, complained of in this motion as being burthensome and unreasonable, apart from the general objection that the corporation has no power to expropriate an easement.

However liberally the Court ought to construe a statute in favour of the public right of eminent domain, yet I take it to be clear that where such complete interference with the rights of property is claimed as is claimed here, there must be express words authorizing that interference, and the Act of apparent authorization must be strictly construed.

The section of the Municipal Act invoked is section 479, sub-section (15) " \* \* for entering upon, breaking up, taking or using any land \* \* ."

No such power as is claimed is conferred by this section, unless it be by the employment disjunctively of the expres-

sion "or using." "Using" applied to land cannot mean <sup>Judgment.</sup> wasting, consuming, or exhausting by employment, as, <sup>Falconbridge,</sup> *e. g.*, to use flour, beer, or water, for food or drink. It means holding or occupying, and so it must be read with the rest of the section, and particularly in connection with the word "taking," and it falls far short of what the city contends to be its force. If the word "using" authorizes the taking of an easement, much more would it authorize the taking of land for an estate less than freehold or less than the estate of the owner, for example, the expropriation as against the owner in fee of an estate for his life or for years, which, I think, will hardly be contended for. <sup>J.</sup>

The compensation clause, section 483, uses the same form of words "entered upon, taken or used," and gives us no assistance. Nor does the 52 Vic. ch. 73, sec. 11 (O.), help the city. It speaks of the city acquiring the easement, but makes no provision for its compulsory acquisition.

The city has not spent money under this by-law. True, it is one of sequence in a system, but it is not an outlet to anything already constructed. It is the upper end, and as far as it goes the system is complete without it. Therefore I find that it has not been so acted on as to prevent its being quashed.

It was said that the applicants had been guilty of laches. They moved within the year. Section 5 of the by-law provides that the construction of the sewer shall not be commenced until the easement shall be acquired, etc.; so they were not bound to move until the city took action. The applicants appeared, on a notice, given by them, to name an arbitrator, before a Judge of the Court of Appeal, when, as I understand, the objection to which I am now giving effect was raised by the learned Judge, whereupon the applicants gave notice of abandonment. I do not think that the applicants are estopped, but under these circumstances they should not have any costs.

I refer to *Munro v. Watson*, 57 L. T. 366; *Re Bronson and Ottawa*, 1 O. R. 415; remarks of Mr. Justice Osler and English and American cases cited at p. 431.

The by-law will be quashed without costs.



## [CHANCERY DIVISION.]

## MOOT V. GIBSON.

*Covenant—Beneficial right thereunder—Action by stranger to enforce—Equitable execution—Receiver.*

Where the effect of a contract is to give a stranger to it a beneficial right thereunder he may enforce such right by action.

And where in an agreement for the exchange of certain lands between the sons of the defendant and a third party, which was carried out, and in which the defendant released her dower, and also conveyed lands of her own to the third party for the benefit of her sons, in consideration whereof they, jointly with her, covenanted with such third party to pay her an annuity to be secured by mortgage it was :—

*Held* that although not named as a covenantee, she was entitled to maintain an action to enforce such covenant, and that a judgment creditor of hers was entitled to have equitable execution against her and a receiver appointed to receive payment of the annuity.

**Statement.**

THIS was a motion for the appointment of a receiver under the circumstances set out in the judgment.

The motion was argued on June 23rd, 1891, before ROBERTSON, J.

*Collier*, for the plaintiff, stated the facts, and asked for the appointment of a receiver.

*Marsh*, Q. C., for the defendant. There is nothing due the defendant under the agreement which she could enforce; for although she joined with her sons in covenanting with a third party, that the money should be paid to her, there was no agreement with her as a promisee that the money should be so paid: *Tweddle v. Atkinson*, 1 B. & S. 393. No order could enforce payment from the sons, as they are in the North-West Territories, and so are out of the jurisdiction of the Court. There is really nothing to receive, and no good would result from the appointment of a receiver; *Smith v. The Port Dover and Lake Huron R. W. Co.*, 8 O. R. 256 and 12 A. R. 288; *Graham v. Devlin*, 9 C. L. T. (Occ. N.) 137; *I—— v. K——* W. N., March 8, 1884, p. 63.

*Collier*, in reply. There is such a privity of contract Argument. as gives jurisdiction : *In re Orr Ewing—Orr Ewing v. Orr Ewing*, 22 Ch. D. 456. On the face of the agreement there is a right of action by the mother against the sons. Even if there was no such right of action the recital shows what the agreement was that was entered into, and the evidence shows there has been a part performance. The cases cited on the other side only shew that a covenant entered into between two persons for the benefit of third party cannot be enforced by such third party, but here Mrs. Gibson is a party to the contract though she did not sign it ; *Gandy v. Gandy*, 30 Ch. D. 57.

June 26, 1891. ROBERTSON, J. :—

This is a motion on behalf of the plaintiff, who is a judgment creditor of the defendant for the sum of \$621.82, debt, and \$29.24 costs, for the appointment of a receiver to receive from John C. Gibson, George W. Gibson, and Frederick A. Gibson (who are sons of the defendant), the sum of \$450, alleged to be due and payable by them to the defendant, the judgment debtor—on an agreement made between them on or about 30th July, 1889, whereby the defendant at the request of her said three sons, agreed to release, and did release her dower in certain lands inherited by them from their late father, and to convey, and did convey by deed in fee simple, other lands held by her, in her own right, to one Bullivant, in part payment of an assignment of all his right, title, and interest in and to certain lands in Assiniboia made by him to her said three sons.

It appears in evidence that John Gibson, the husband of the defendant Delilah and the father of the other three persons (Gibson), died intestate, in June, 1887, seized in fee and in possession of twelve acres of land being part of lot fourteen in the second concession of Grantham ; and the defendant was possessed in her own right in fee of twenty-two acres, adjoining the said twelve acres, and

Judgment. being a part of said lot fourteen. That the said John Gibson Robertson, J. left him surviving his said wife, his said three sons, and also three daughters, all of whom agreed to convey and did convey, the said two parcels of land, to the said Francis Bullivant in consideration that he would pay off all mortgages etc., thereon, and grant and convey unto the said brothers Gibson, (subject to a payment by them of \$150 per year to their mother, the said Delilah, for and during her natural life, in lieu and in satisfaction of her dower and interest in the said Grantham lands, so conveyed to said Bullivant), the whole of section 9, in township number 16, in Range number 51, West of the first principal meridian, in Assiniboia, Western Territories, the said Bullivant, then holding contracts for the same, numbers 1883 and 1884, issued by the land department of the Canadian Pacific Railway Co. to the said Bullivant, the said parties of the second part, agreeing to pay all sums due or to come due to the said Canadian Pacific Railway Company under said contracts, and when so paid, to be entitled to a conveyance of said section of land, upon giving to Bullivant a first mortgage thereon, securing \$1,791.69, with interest at six per cent., to be computed from 1st April, 1889, payable as therein mentioned.

And by the said agreement "the said parties of the second part" also agreed to give a second mortgage to the said Delilah Gibson, on said section of land, securing to her the said sum of \$150 a year, for and during her natural life, to be computed from 1st April, 1888, and payable as follows: \$300 on 1st April, 1890, and \$75 on 1st days of October and April thereafter, during her natural life, with interest at six per cent. on all overdue payments from time of default until actually paid. The "contracts and assignments to be held and remain in possession of A. G. B. of St. Catharine's, barrister, until the terms and conditions of this agreement are faithfully performed and carried out by the said John C. Gibson, George W. Gibson and Frederick A. Gibson, when the said contracts and agreements are to be delivered up."

So far the party of the first part (Bullivant), it appears Judgment.  
 has carried out his part of the agreement, and the parties Robertson, J.  
 of the second part have conveyed to him the thirty-four  
 acres in Grantham; but neither the mortgage to Bullivant  
 nor the mortgage to Delilah have been executed.

It is contended, therefore, on behalf of the defendant, that as between her and her three sons, John C. Gibson, George W. Gibson, and Frederick A. Gibson, she is not in a position to enforce the agreement; that she and her three sons covenanted and agreed to and with Bullivant, that she and they would not only pay off the Canadian Pacific Railway Company, but would give a first mortgage to Bullivant to secure the said sum of \$1,791.69, due to him, but that they "the parties of the second part," (*i. e.*, she the said Delilah and her said three sons), would give to her, Delilah, a second mortgage, to secure the annuity to her, Delilah, of \$150 per annum. And that by reason of the form of this covenant, she being a covenanting party with her sons, that she and they would give to her the mortgage, she could not enforce specific performance in her own name against her three joint covenantors; and further, that she is therefore, for the same reason, unable to enforce the agreement to pay the annuity, and consequently it would be useless to appoint a receiver for the reason that he would have no power either to compel the said three sons to make payment, etc.

Mr. Marsh, Q. C., cites and relies on *Tweddle v. Atkinson*, 1 B. & S. 393, which was a common law action, the declaration in which stated that in consideration of an intended marriage between the plaintiff and the daughter of W. G., W. T. the father of the plaintiff and W. G. verbally promised to give their children marriage portions; and that after the marriage W. G. and W. T. as a mode of giving effect to their said verbal promises, entered into a written agreement, by which it was mutually agreed that they should pay the sums of £200 and £100 respectively to the plaintiff, and that the plaintiff should have full power to sue for the same in any court of law or equity, Breach: — Non-



Judgment. payment of the £200 by W. G. or by the defendant his  
 Robertson, J. executor :—Held on demurrer that the action was not maintainable, notwithstanding the near relationship of the plaintiff to the party from whom the consideration moved.

There is an old case, referred to in the above, *Bourne v. Mason*, 1 Vent. 6, in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But Wightman, J., in giving judgment in *Tweddle v. Atkinson*, said : “there is no modern case in which the proposition has been supported. On the contrary, it is now established *that no stranger to the consideration can take advantage of a contract, although made for his benefit.*”

Now this case, so strongly urged and relied upon by Mr. Marsh, in my judgment is not an authority against this plaintiff's contention ; on the contrary, the words italicised by me imply that where the party trying to enforce the contract is *not* “a stranger to the consideration,” that party can enforce such a contract, and I am supported in that opinion by the remarks of Bowen, L. J., in *Gandy v. Gandy*, 30 Ch. D. at p. 69, where he refers to this same case of *Tweddle v. Atkinson*, in these words : “It is sufficient to say that in the case of *Tweddle v. Atkinson*, to which we were referred, the true common law doctrine has been laid down. But whatever may have been the common law doctrine, if the true extent and the true effect of this deed was to give to the children a beneficial right under it, that is to say, to give them a right to have these covenants performed, and to call upon the trustees to protect their rights and interests under it, then the children would be outside the common law doctrine, and would, in a Court of Equity, be allowed to enforce their rights under the deed. But the whole application of that doctrine, of course, depends upon its being made out, that upon the true construction of this deed it was a deed which gave the children such a beneficial right.”

Now there is no doubt as to what the true construction Judgment. of the agreement in question is in regard to this defendant; Robertson, J. it is a deed which gives her a beneficial right. That is, by it she has the right to say, that upon her three sons acquiring the title to the Assiniboia lands, she is entitled to have and receive from them a second mortgage thereon (the first mortgage to secure \$1,791.69 to Bullivant) as security for the payment of the annuity in the agreement mentioned, and to maintain an action in her own name against her three sons for the enforcement of the covenant: even at common law I am inclined to think she would have that remedy, but the rule in equity now prevails, and she unquestionably would have that right now.

But, apart from that, and on another principle altogether, in my judgment, this defendant Delilah, could enforce the original contract of which the agreement affords cogent evidence as between her and her three sons, the consideration came from her, and was in this wise. She not only released all her right to dower in the twelve acres, but conveyed the fee simple in the other twenty-two acres to Bullivant, in consideration that the three sons would pay to her, during life, an annuity of \$150 per year.

So far as she is concerned she has performed her part of the agreement; and in regard to the three sons they accepted from Bullivant an assignment of all his right, title and interest in and to the lands in Assiniboia; it is true, that this annuity was to be secured under the agreement between Bullivant and the three sons and the defendant by a second mortgage on the Assiniboia property, when they, the three sons, obtained a conveyance therefor from the Canadian Pacific Railway Company, but their not giving that security would not disentitle the mother from enforcing payment of the annuity which they agreed to pay, in consideration that she would release her dower in the lands which they inherited from their late father, and would convey her own lands to Bullivant for their special benefit.

I think, therefore, the plaintiff is entitled to equitable execution, in the manner asked, and that he should be

Judgment. appointed receiver for that purpose. And this disposes of  
Robertson, J. the other question, that there being nothing to receive, the Court will not appoint a receiver. Here the mother, the defendant in this action, can maintain an action to recover the annuity against her three sons, on the promise, as clearly evidenced by that agreement, to pay her that annual sum.

Mr. Marsh also objected that this Court had no jurisdiction to entertain an action on the agreement, as the three sons are out of the jurisdiction, and the lands on which the mortgage is to be given are not within this province.

In view of the opinion, which I have expressed, it is not necessary to consider whether this Court could enforce the covenant to give to the defendant the said mortgage, inasmuch as my judgment is not founded on that covenant, except as a matter of evidence to establish the original agreement; but on the agreement between the defendant and her three sons, which is evidenced by that covenant. The agreement by which they are to pay the annuity was made in this province, and the defendant resides here, the three sons having subsequently moved to Assiniboia. Under these circumstances I am of opinion there is jurisdiction to sustain an action to enforce the agreement to pay the annuity.

I think the plaintiff is entitled to his costs of this motion.

G. A. B.

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## [CHANCERY DIVISION.]

## LASBY ET AL. V. CREWSON ET AL.

*Partition—Improvements on land—Tenancy in common—Improvements made before accrual of tenancy.*

The right of a tenant in common, in an action for partition of the property, to be paid for improvements executed by him thereon, is restricted to such as are made by him after his tenancy in common has commenced in fact.

And where a tenant in common, in remainder, by an agreement with the tenant for life, went into possession of the property and during the life tenancy expended a large sum of money in permanent improvements at the request of the tenant for life :—

*Held*, that he was not entitled to the value of such improvements.

THIS was an appeal from a decision of a local Master Statement. allowing the value to one Alexander Lasby of certain improvements made by him, while in possession under an arrangement with the tenant for life of property devised by Oliver Lasby.

The action was brought for the construction of the will of Oliver Lasby, and for the sale and distribution of his estate, and is reported as to the construction of the will, *ante* p. 93.

The appeal was argued on September 3rd, 1891, before BOYD, C.

The following are the material parts of the Master's decision in which the facts are fully stated :

The testator died in the year 1859, having by his last will and testament bequeathed a life estate in the property in question to his wife with remainder to his children in certain proportions. The testator's widow died in 1890, and by the construction placed upon the will by the judgment in this action Alexander Lasby is entitled to two-seventeenth parts of said property, but besides this he claims to be entitled to improvements made upon the property in the lifetime of his mother.



**Statement.**

It appears that Alexander Lasby entered into possession of the property on the 1st April, 1874, in pursuance of an arrangement made with his mother, that he should work the place for his mother during her lifetime and support and maintain her and her unmarried daughters, and that anything over he was to have for himself. Alexander remained in possession of the property until his mother's death, under that arrangement, and provided a comfortable home for her and her unmarried daughters until their marriage.

In the years 1881 and 1882 a brick dwelling-house was erected upon the property costing \$2,500, and in 1889 a stone building was put up at a cost of \$500, and it is in respect of these buildings that Alexander claims to be allowed for improvements.

I cannot see why Alexander should not be allowed for these improvements, as it is manifest that he has enhanced the value of the property considerably (if not to the extent of the value of the improvements) by making them.

It was urged that it was his mother and not Alexander who made the improvements, and that Alexander has had the use of the property on the terms hereinbefore mentioned for about sixteen years, and that he could therefore well afford to make these improvements. I do not see how this can be any reason for disallowing to Alexander improvements by which the value of the property has been materially enhanced.

If the mother had let Alexander have the property for nothing, the other devisees would have no cause of complaint, as the mother could have dealt with the property as she pleased during her lifetime.

I find that these improvements were made by Alexander during the lifetime of his mother, and paid for by him out of his own moneys, excepting about \$400 he received from his mother, and that they were so made whilst he was in possession of the property under the said arrangement made with his mother.

These being the facts, is Alexander entitled to be allowed for these improvements?

The repairs by a tenant for life however substantial and Statement.  
lasting are his own voluntary act, and do not arise from any obligation, and he cannot charge the inheritance with them: *Re J. T. Smith's Trusts*, 4 O. R. 518; *Floyer v. Bankes*, L. R. 8 Eq. 115.

I think the authorities determine beyond any question that in a suit for partition a co-tenant is entitled to lasting improvements or repairs, by which he has enhanced the value of the property. I refer to *Rice v. George*, 20 Gr. at p. 226; *Wood v. Wood*, 16 Gr. 471; *Morley v. Mathews*, 14 Gr. 551; *Pascoe v. Swan*, 27 Beav. 508; *Teasdale v. Sanderson*, 33 Beav. 534, and *Leigh v. Dickeson*, 15 Q. B. D. 60. The judgment of Cotton, L. J., in the latter case, puts the question in my judgment beyond any doubt. He says at p. 67: "Therefore, no remedy exists for money expended in repairs by one tenant in common; so long as the property is enjoyed in common; but in a suit for partition it is usual to have an enquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value. There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition."

It was contended that as these improvements were made in the lifetime of the tenant for life and not by Alexander whilst in possession as co-tenant, therefore they ought not to be allowed, for *i. e.*, had Alexander remained in possession after his mother's death, and then made these improve-

Statement.   ments he would be entitled to claim for them, but having made them during his mother's lifetime he cannot recover anything for them.

I have been unable to find any authority upon this point, but I do not see any reason why he shouldn't be allowed for them in the one case as well as the other. Why should his co-devisees get the benefit of his expenditure and labour? Surely on making a partition of the property they must each contribute their fair share of these improvements by which the whole property has been enhanced in value.

I do not see why any of the co-devisees during their mother's lifetime could not have made necessary and needful improvements upon the property, thereby enhancing its value and upon a partition being allowed therefor.

On the whole I am of opinion that Alexander is entitled to be allowed for his improvements less what he received from his mother, but upon what basis as to value I do not now determine.

From this decision three brothers and the children of a deceased sister appealed, and the appeal was argued on September 3rd, 1891, before BOYD, C.

*Hoyles, Q. C.*, for the adult appellants. Alexander was in possession of the property for sixteen years, while his mother was entitled as tenant for life, and it was during that time he made the improvements. He made them for her and so he cannot charge for them. Even if he was in as a tenant in common he could not be allowed for them, unless he consented to be charged with an occupation rent. As to tenants in common I refer to *Rice v. George*, 20 Gr. 221, and *Scott v. Guernsey*, 48 N. Y. R. 106. *Leigh v. Dickeson*, 15 Q. B. D. 60, does not meet this case.

*Aytoun-Finlay*, for the infant appellants. Alexander was not a tenant in common when the improvements were made. There was no mistake of title. The tenant for life cannot be allowed for any improvements not actually

necessary, and the house in question was not: *Re J. T. Argument. Smith's Trusts*, 4 O. R. 518; *Floyer v. Bankes*, L. R. 8 Eq. 115.

*Bigelow*, Q. C., *contra*. *Scott v. Guernsey* arose out of an agreement, and the tenant was paid in full which distinguishes it from this case. Compensation does not depend on occupation. The equity is that one joint tenant should not get the benefit of another joint tenant's expenditure. [BOYD, C.—One test is that the expenditure should attach when made, but that was not this case for the question did not arise until the life tenant's death.] *Bigelow*.—I submit the cases do not go that far. The evidence shews the mother and sisters had to be kept on the place, and the old house was not fit to live in.

September 5, 1891. BOYD, C.:—

In *Leigh v. Dickeson*, 15 Q. B. D. at pp. 66 and 67, Cotton, L. J., says: "As to the claim for improvements, it has been urged that no tenant in common is entitled to execute improvements upon the property held in common, and then to charge his co-tenant in common with the cost. This seems to me the true view. \* \* \* \* \*

Therefore, no remedy exists for money expended in repairs (or improvements) by one tenant in common, so long as the property is enjoyed in common; but in a suit for partition it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is decided to put an end to that state of things, it is then necessary to consider what was expended in improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by



Judgment.  
Boyd, C.

accepting the increased value." This is a recent statement of the same principles of law which were considered and applied in *Rice v. George*, 20 Gr. at p. 226, where the further doctrine of equity is acted upon that if a tenant in common has been in the beneficial occupation of property, and has also made improvements he must if he asks for compensation in any shape for his improvements account for the profits he has derived from his occupation.

But it is assumed in both cases that the improvements are made by a tenant in common, *i.e.*, by a person who has with his fellow-tenants a right to the present possession of the land.

The essence of a tenancy in common is the unity of possession by which in theory the occupation of one is attributed to all. But if improvements are made before the tenancy in common begins in fact, *e.g.*, during a prior life tenancy as in this case, then the equitable doctrines attaching to improvements made during tenancies in common do not arise. Each tenant in common is entitled to enter upon the whole property and exercise acts of ownership over it, and if one enters upon the whole and improves it in the absence of the others it is assumed that they have sanctioned the improvements.

But in this case when the improvements were made the sole right of possession was in the widow, the life-tenant, and though made by the present tenant in common (respondent) they were made at her request, and probably because he was allowed the usufruct of the farm. At all events the others had no right to intervene and they seem to have regarded the improvements as those of the life tenant, which would enure to the general benefit of the estate.

In brief these improvements were not made by the respondent in the character of tenant in common, but as the agent of his mother, the life-tenant.

A convenient test of his equity to get compensation is this: did any lien or claim for improvements arise in his favour at the time of the outlay, as against his present

co-owners? Manifestly not, because the estate was not then in co-ownership. If not, then the mere efflux of time, by which the life-tenancy was ended does not create obligations non-existent before: *Scott v. Guernsey*, 48 N. Y. R. 106, is much in point, and *McIntosh v. The Ontario Bank*, 20 Gr. 24, may be looked at.

The point is a new one, and while I reverse the Master's ruling I direct the costs of all parties to be paid out of the estate.

G. A. B.

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[CHANCERY DIVISION.]

THE ACME SILVER CO. V. THE STACEY HARDWARE, ETC., CO.

*Defamation—Libel—False and malicious publication as to goods manufactured by plaintiffs—Allegation of special damage—Demurrer.*

In an action of libel the plaintiffs' statement of claim alleged that the defendants falsely and maliciously published of and concerning the plaintiffs' goods " \* \* We do not keep Acme or common plate " and also alleged special damage:

*Held*, on demurrer, that as the allegation was that the defendants " falsely and maliciously " published of and concerning the plaintiffs, etc., and as special damage was alleged in direct terms, following *The Western Counties Manure Co. v. The Lawes Chemical Manure Co.*, L. R. 9 Ex. 218, if the plaintiffs were able to prove that allegation, they would be entitled to judgment, and the demurrer was overruled.

THIS was a demurrer by the defendants to the plaintiffs' **Statement.** statement of claim in an action of libel brought by the Acme Silver Company against the Stacey Hardware and Manufacturing Company.

The statement of claim alleged the publication in a newspaper by the defendants of an advertisement and proceeded " in which advertisement the defendants falsely and maliciously published of and concerning the plaintiffs the words following that is to say: ' Note some of the following facts: that we carry the largest and best-selected stock of silver ware in Western Ontario; none but quadruple plate direct from the following manufacturers (naming three com-

## Statement.

panies). Guarantee—We warrant each and every piece of silver plate to be exactly as represented : We do not keep *Acme or common plate.*” Meaning thereby that the goods manufactured by the plaintiffs were of a common and inferior class, and not of the same grade as the goods of other manufacturers kept in stock by the defendants, and not of such kind and quality as the defendants would keep in stock and recommend to their customers and the public. And the statement of claim alleged special damage.

The defendants’ demurred on the ground that the words complained of were not actionable.

The demurrer was argued on the 16th September, 1891, before ROBERTSON, J.

*John A. Robinson*, for the demurrer. The first part of the advertisement is a mere puff of the goods. Even the words “ we do not keep *Acme or common plate* ” is no libel. The word “ or ” is disjunctive and there is no innuendo that *Acme* is common. There is no direct statement that the goods are inferior : *Young v. Macrae*, 3 B. & S. 264.

*S. King*, contra. The plaintiffs allege in their statement of claim loss of business and allege special damage. If they prove that, they must succeed, and the statement of claim is not demurrable ; an untrue statement causing damage is actionable : *The Western Counties Manure Co. v. The Lawes Chemical Manure Co.*, L. R. 9 Ex. 218. The advertisement is more than a puff, it strikes at the plaintiffs to injure them. It is not what the defendants meant, but what reasonable people would think they meant. If the plaintiffs have a cause of action they should be allowed to go to trial. *Young v. Macrae*, is reported differently in L. J. 32 Q. B. 6 ; 7 L. T. 354, and 11 W. R. 63 ; but in that case no special damage was alleged, and that was the reason it was dismissed.

*Robinson*, in reply. In *Young v. Macrae*, the libel was the same as here.

September 17th, 1891. ROBERTSON, J.:—

Judgment.

Robertson, J.

I think the plaintiffs are entitled to judgment on this demurrer. The charge is that the defendants “falsely and maliciously” published of and concerning the plaintiffs, etc. Now in the case relied upon by defendants, *Young v. Macrae*, 3 B. & S., at p. 269, Cockburn, C. J., says, “I am far from saying that if a man falsely and maliciously makes a statement disparaging an article which another manufactures or vends, although in so doing he casts no imputation on his personal or professional character, and thereby causes an injury, *and special damage is averred*, an action might not be maintained.”

Here special damage is alleged in direct terms, and if the plaintiffs are able to prove that allegation on the authority of *The Western Counties Manure Co. v. The Lawes Chemical Manure Co.*, L. R., 9 Ex. 218, I think the plaintiffs are entitled to judgment. I therefore give judgment against the demurrer with costs in the cause to the plaintiffs.

G. A. B.

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## [CHANCERY DIVISION.]

## RE THE UNION FIRE INSURANCE COMPANY.

## McCord's Case.

*Company—Winding-up—Contributory—Purchase by company of its own shares—Transfer to “manager in trust”—Ignorance of transferor—Liability of manager as contributory.*

The manager of an insurance company, authorized by the directors, with the moneys of the company, purchased from the holder thereof, who was ignorant of the object intended, a number of partly paid up shares of the company on which calls were in arrear, for the purpose of cancellation, taking the transfer to himself “as manager in trust.” The company had no power to deal in its own stock. The shares were never cancelled the dividends thereon being credited to the company :—  
*Held*, in liquidation proceedings, that in the absence of knowledge by the transferor that the purchase was for an illegal purpose, the manager was properly placed on the list of contributories.

## Statement.

THIS was an appeal from the Master-in-Ordinary by one Andrew T. McCord under the following circumstances.

One C. W. Currier was the holder of 127 shares in the Union Fire Insurance Company on which only a small amount had been paid. He failed to pay the calls made by the company as they became due, when the directors resolved that their manager, A. T. McCord, should purchase the stock for cancellation. This was done, the purchase money being paid with the moneys of the company, and the stock being assigned by Currier to McCord, as “manager in trust”; the dividends on it being thereafter credited to the company. The stock was not cancelled, and remained in McCord's name until the company was put into liquidation under R. S. C. ch. 129, when the Master placed him on the list of contributories as a shareholder.

From this ruling McCord appealed, and the appeal was argued on October 1, 1891, before BOYD, C.

*E. F. B. Johnston*, Q.C., for the appeal. What McCord did was for the sole benefit of the company. It was intended to cancel the shares and McCord purchased for that pur-

pose as the company had no power to deal in its own Argument. shares. If McCord had been trafficking in the shares he might have been held liable, but he merely purchased for cancellation and so cannot be held liable. [BOYD, C.—But was the stock ever cancelled, was it not treated as living stock and did not outsiders deal with the company on that footing?] *Johnston*.—Yes, but the shareholder who does not shew that his transfer is a valid one does not get rid of his liability: *Cross' Case*, 38 L. J. (Ch.) 583, quoted from in Buckley on the Companies Acts, 5th ed., p. 39. [BOYD, C.—How can you take it off McCord and put it on Currier when he is not before the Court?] *Johnston*.—I do not seek to put it on Currier, but to take it off McCord. [BOYD, C.—But the stock must be represented by some one.] *Johnston*.—Currier should be before the Court, but whether he is liable or not may not affect McCord's position. If Currier thought McCord was purchasing for himself perhaps McCord might be made liable, but the evidence does not shew that: *Re The Consols Insurance Association—Benham's Case*, 11 Jur. N. S. 381. If the transfer was bad the assignor must become liable: *Eyres' Case—In re The Mitre Assurance Co.*, 31 Beav. 177. Here the transaction was void, and Currier is not relieved. It was understood at the time that McCord was not to be held liable as a stockholder.

*Hilton, contra*. When the winding up order was made the stock stood in the name of McCord on the register of the company; he cannot evade liability to creditors by showing the purchase was in trust for the company, and that the purchase money was paid by the company, which would be *ultra vires* the company: *In re Imperial Mercantile Credit Association v. Chapman and Barker's Case*, L. R. 3 Eq. 361; *Cree—Somervail*, 4 App. Cas. 648; *In re London, Hamburg and Continental Exchange Bank—Zulueta's Claim*, L. R. 5 Ch. 444; *In re Hull and County Bank—Burgess' Case*, 15 Ch. D. at p. 509; *Re The Moseley Green Coal and Coke Co., Limited—*

**Judgment.** *Barrett's Case*, 4 DeG. J. & S. at p. 421; *Re Central Bank*  
**Boyd C.** —*J. D. Henderson's Case*, 17 O. R. 110.  
*Johnston, Q. C.*, in reply.

October 3, 1891. BOYD, C. :—

There is no evidence to lead to the conclusion that the shares in question were transferred to a nominee of the company so far as the first holder, Currier, was concerned. This knowledge would have vitiated the transaction, but being made for consideration paid to the "manager in trust," with no notice of the character in which he was to hold them, there appears to be on the authorities a valid transfer which would relieve the first holder and impose (as against creditors) liability in the transferee. No valid distinction can be drawn between cases when the object of the transfer is to traffic in shares on the part of the company and when the intention is simply to cancel. In either case (no special power so to do being given to the particular company) the transfer is illegal, but liability upon the shares is transferred, or not, depending upon the knowledge or ignorance of the prior holder. The cases of *Qree v. Somervail*, 4 App. Cas. 648; *Re Royal British Bank—Nicol's Case*, 3 DeG. & J. 387; *Re Central Bank—J. D. Henderson's Case*, 17 O. R. 110, justify the Master's ruling, and I must dismiss the appeal with costs.

G. A. B.

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## [QUEEN'S BENCH DIVISION.]

## MINGEAUD V. PACKER ET AL.

*Insurance—Life—Benefit society—Change of direction as to payment—Trust—Revocation—R. S. O. ch. 172—R. S. O. ch. 136—51 Vic. ch. 22 (O.)*

A person whose life was insured in a benefit society, incorporated under R. S. O. 1877 ch. 167, as amended by 41 Vic. ch. 8, sec. 18 (O.), now R. S. O. 1887 ch. 172, on the 28th January, 1888, his first wife being then dead, caused to be issued to him a certificate making the insurance money payable to his children. After this he married again, and on the 1st June, 1889, at his request, a change was made, and a new certificate issued making the money payable to his second wife. He died on the 19th November, 1889:—

*Held*, reversing the judgment of STREET, J., that the effect of 51 Vic. ch. 22 (O.), was to make the certificate of the 28th January, 1888, subject to the provisions of R. S. O. ch. 136, and that the rules of the society, in so far as they were inconsistent with such provisions, were modified and controlled by them; and such certificate became a trust for the children, under sec. 5 of R. S. O. ch. 136, and ceased, so long as the objects of the trust remained, to be under the control of the deceased, except only in accordance with secs. 5 and 6, which did not authorize him to revoke the certificate and replace it by the subsequent one.

AN interpleader issue tried at Whitby on the 28th *Statement.*  
October, 1890, before STREET, J., in whose judgment the facts are stated.

January 31, 1891. The case was argued before the trial Judge.

*N. F. Paterson*, Q. C., for the plaintiff.

*D. B. Simpson*, for the adult defendants.

*C. J. Holman*, for the official guardian, representing the infant defendant.

February 4, 1891. STREET, J.:—

This was an interpleader issue which came on for trial before me at the Whitby Assizes on the 28th October, 1890. The facts were then formally proved, and the argument by consent of counsel was adjourned, and came on at Osgoode Hall on 31st January, 1891.



Judgment.

Street, J.

The plaintiff, Christina Mingeaud, was the second wife and is the widow of Arthur Mingeaud, deceased. The defendants are his children by his first wife, one of them being an infant.

On 22nd September, 1882, Arthur Mingeaud, being a member of Bowmanville Lodge No. 99 of the Ancient Order of United Workmen, received from the order a beneficiary certificate entitling his then wife Annie Mingeaud to receive \$2,000 at his death, subject to his will.

On 9th August, 1883, he was allowed under the rules of the order to alter this direction, and a new certificate was issued to him, by which the money was made payable absolutely to his said wife Annie Mingeaud.

In December, 1887, Annie Mingeaud died.

On 28th January, 1888, the existing certificate was cancelled at the request of Arthur Mingeaud, and a new one was issued, by which the money was made payable to his children, the three defendants, as follows :

To his daughter Mary Packer, \$800 ; to his son Arthur Mingeaud, \$600 ; to his son Augustus Mingeaud, \$600.

On 28th February, 1888, Arthur Mingeaud married the present plaintiff.

On 1st June, 1889, he desired to make a further change in the direction he had given as to the disposal of the \$2,000, and, by a writing on the back of the certificate of 28th January, 1888, he authorized and requested the issue of a new certificate making the money payable to his then wife, the present plaintiff. The certificate, indorsed with this direction duly attested, was delivered to the grand lodge, who issued, signed, and sealed a new certificate, dated 1st June, 1889, which was forwarded by them to the recorder of lodge No. 99, to which Arthur Mingeaud belonged. The recorder never obtained the signature of the master workman of the local lodge to this new certificate, and it never was delivered to Arthur Mingeaud, but always remained in the custody of the local lodge until his death, which took place on 19th November, 1889.

The money is claimed by the plaintiff under the certifi-

cate of 1st June, 1889, and by the defendants under that Judgment.  
of 28th January, 1888. Street, J.

The grounds upon which the defendants present their claim are these:—

1st. That Arthur Mingeaud's right to alter the direction he had given as to the disposal of the money is governed by sec. 6 of ch. 136, R. S. O., being "An Act to Secure to Wives and Children the benefit of Life Insurance," and that, under that Act, he had no right to deprive his children entirely of the insurance money, and give it all to his second wife.

2nd. That, if governed by the rules of the benefit society, and not by the Act above mentioned, the change was never actually made from the direction in favour of the defendants to that in favour of the plaintiff, because the new certificate was never signed by the master workman of the local lodge.

The rules of the society were put in.

I think the rights of the parties here are governed by the rules of the Ancient Order of United Workmen, and that it is not necessary to consider what they might be under ch. 136, R. S. O.

In sec. 11 of ch. 172, R. S. O., "An Act respecting Benevolent, Provident, and other Societies," it is, amongst other things, provided that "when, on the death of a member of a society, any sum of money becomes payable under the rules of the society, the same shall be paid by the treasurer or other officer of the society to the person or persons entitled under the rules thereof."

It is true that, by 51 Vic. ch. 22 (O.), it is enacted that the provisions of ch. 136, R. S. O., shall extend and apply to beneficiary certificates issued by benevolent societies; but that Act, as is clearly shewn by its twenty-third section, was not intended to restrict or interfere with any existing legal methods of dealing with policies. It cannot be supposed that the legislature intended, by simply applying the provisions of ch. 136 to societies incorporated under ch. 172, to sweep away the right of those societies of making

Judgment.  
Street, J.

rules providing for the application of moneys under their beneficiary certificates. These rights had been expressly conferred by statute, and they are not to be taken away except by express enactment, or necessary implication from some enactment. I find neither here; and therefore the right to make these rules must be taken to exist, and the person entitled, under the rules of the society here in question, to the money payable under the certificate in question, must be held entitled to it.

Section 1 of article 7 of the rules provides that, upon the death of a member, such person or persons as he may have named while living shall be entitled to receive from the fund of the order the sum of \$2,000, provided he shall have complied with the rules.

Section 5 provides that upon application for certificate duly approved by the provincial medical examiner, the grand recorder shall immediately issue and forward the certificate to the subordinate lodge, where it shall be countersigned by the master workman with the seal of the subordinate lodge attached, attested by the recorder, and when the applicant has received the workman degree the certificate shall be delivered to him, a record be made of same in the books of the lodge, and he shall be entitled to all the rights and privileges of the order.

Section 18 provides that any member holding a beneficiary certificate, desiring at any time to make a new direction as to its payment, may do so by authorizing such change in writing on the back of his certificate in the form prescribed, attested by the recorder, etc.; but no change of direction shall be valid or have any binding force or effect until said change shall have been reported to the grand recorder, the old certificate, if practicable, filed with him, and a new beneficiary certificate issued thereon; and the said new certificate shall be numbered the same as the old certificate.

Section 4 provides that the grand lodge shall issue, or cause to be issued, all certificates of the beneficiary fund, which certificates shall be in substance as follows :—

The form which is here given is that of the beneficiary certificate to be issued by the grand lodge, with a form at foot of it to be countersigned by the master workman and recorder of the local lodge in accordance with section 5 above quoted.

Judgment.  
Street, J.

The defendants' contention is that the direction in favour of the plaintiff never had any binding effect, because the new certificate issued by the grand lodge was never countersigned by the recorder of the local lodge.

The rule which requires certificates to be so countersigned is section 5, which only applies to the original certificate: this is made apparent by the fact that the certificates to which it relates require the approval of the medical examiner, while certificates substituted under section 18 do not.

Section 4 shews that all certificates are issued by the grand lodge; the additional formality of countersigning by the local lodge officers is required in the case of original but not of substituted certificates; so that when the certificate of 1st June, 1889, left the hands of the grand lodge officers, duly signed and sealed by them, it was a completed instrument under section 18, and required nothing further to make it valid.

I therefore find the issue in favour of the plaintiff, and order that the moneys in Court, after payment thereof of the costs of the guardian *ad litem* of the infant defendant, be paid out to the plaintiff, and that the plaintiff be entitled to recover from the adult defendants the costs of the issue, including the costs paid to the guardian of the infant defendant, and also the costs of the action in which the interpleader issue was directed, and the costs paid to the defendants in that action.

The defendants appealed to the Divisional Court, and the appeal was argued before ARMOUR, C. J., and FALCONBRIDGE, J., on the 26th May, 1891.

*D. B. Simpson*, for the adult defendants. The certificate comes under R. S. O. ch. 136. In *Re O'Heron*, 11 P. R. 422,



**Argument.** the Act was held not to apply to benefit societies; but 51 Vic. ch. 22 (O.), was passed for the express purpose of making it apply; and in *Swift v. Provincial Provident Institution*, 17 A. R. 66, it was held that it applied. Sec. 18 of the rules of the society does not conflict. The amendment made by 53 Vic. ch. 39, sec. 6, recognizes this.

*C. J. Holman*, for the official guardian. This is a trust, and not revocable: R. S. O. ch. 136, sec. 5; *Re Seyton*, 34 Ch. D. 511; Porter on Insurance, 2nd ed., 335-6; *Elsey v. Oddfellows' M. R. Association*, 142 Mass. 224; *Pilcher v. New York Life Ins. Co.*, 33 La. 322; *New York Life Ins. Co. v. Statham*, 93 U. S. 24.

*N. F. Paterson*, Q. C., for the plaintiff. The beneficiary takes no interest under the certificate of a benefit society such as this; the certificate is not like the ordinary life policy: Bacon on Benefit Societies, secs. 304-309; *Oates v. Foresters*, 4 O. R. 535. Even under sec. 6 of R. S. O. ch. 136, "alter" may mean to change the name of the beneficiary. This is an enabling, not a prohibitory, statute.

June 19, 1891. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The Ancient Order of United Workmen was incorporated under the Act R. S. O. (1877), ch. 167, as amended by the Act 41 Vic. (1878), ch. 8, sec. 18. And by section 11 of the said Act as amended, it was provided that "when under the rules of a society any money becomes payable to, or for the use or benefit of, a member thereof, such money shall be free from all claims by the creditors of such member; and when, on the death of any member of a society, any sum of money becomes payable under the rules of the society, the same shall be paid by the treasurer or other officer of the society to the person or persons entitled under the rules thereof, or shall be applied by the society as may be provided by such rules, etc."

A copy of the declaration made in conformity with this Judgment. Act, together with a copy of the constitution and by-laws Armour, C.J. of the said ancient order, was filed in the office of the provincial registrar on the 14th August, 1879.

And by section 1 of article 7 of these rules it is provided that "upon the death of a workman degree member in good standing in a subordinate lodge of the order under the jurisdiction of the Grand Lodge of the Ancient Order of United Workmen of the Province of Ontario, such person or persons as said member may have named while living shall be entitled to receive of the beneficiary fund of the order the sum of two thousand dollars, provided such member shall have complied in all particulars with all the laws, regulations, and requirements of the order, etc."

And by section 18 of article 7 of these rules it is provided that "Any member holding a beneficiary certificate, desiring at any time to make a new direction as to its payment, may do so by authorizing such change in writing on the back of his certificate in the form prescribed, attested by the recorder, with the seal of the lodge attached, and by the payment to the grand lodge of the sum of fifty cents; but no change of direction shall be valid or have any binding force or effect until such change shall have been reported to the grand recorder, the old certificate, if practicable, filed with him, and a new beneficiary certificate issued thereon; and the said new certificate shall be numbered the same as the old certificate," etc.

Then was passed the Act 47 Vic. ch. 20, (O.) "An Act to Secure to Wives and Children the benefit of Life Insurance," by sec. 1 of which Act it was provided that "the provisions of this Act shall apply to every lawful contract of insurance now in force, or hereafter effected, which is based on the expectation of human life, and shall include life insurance on the endowment plan, as well as every other."

This Act was held by the Court of Appeal in *Swift v. Provincial Provident Institution*, 17 A. R. 66, to apply to insurances effected in societies such as the Ancient

Judgment. Order of United Workmen, incorporated under the provisions of R. S. O. (1877) ch. 167.  
Armour, C.J.

This decision was after the consolidation of the statutes in 1887, but upon facts governed by the law as it stood before that consolidation.

In R. S. O. (1887) the Act 47 Vic. ch. 20 appears as ch. 136, and the Act R. S. O. (1877) ch. 167, appears as ch. 172.

R. S. O. (1887) ch. 136 includes in its sec. 1, sec. 1 of 47 Vic. ch. 20, and R. S. O. (1887) ch. 172, sec. 11, is identical with R. S. O. (1877) ch. 167, sec. 11, as amended by 41 Vic. ch. 8, sec. 18.

After R. S. O. (1887), and on the 28th day of January, 1888, the beneficiary certificate was granted by the Grand Lodge of the Ancient Order of United Workmen to Arthur Mingaud, and the sum of \$2,000 made payable at his death was, at his request, made payable to his children, the defendants.

Then on the 23rd of March, 1888, was passed the Act 51 Vic. ch. 22, "An Act to amend the Act to Secure to Wives and Children the benefit of Life Insurance;" by section 1 of which Act it is provided that "the expressions 'contract of insurance,' and 'policy of insurance,' and 'policy,' wherever they occur in the Act to Secure to Wives and Children the benefit of Life Insurance, include any certificate or contract hereinafter mentioned or in any way relating to life insurance;" and by section 2 it is provided that "The provisions of the said Act extend and apply to membership, beneficiary, and other certificates and contracts relating to life insurance issued or entered into by any society or association of persons for any fraternal, provident, benevolent, industrial, or religious purpose, among the purposes of which is the insurance of the lives of the members thereof exclusively, or by any association for the purpose of life insurance formed in connection with any such society or organization and from its members, and which insures the lives of such members, including certificates or contracts heretofore issued or entered into."

It is upon this state of the law that the case in hand Judgment. must be determined, for the beneficiary certificate making Armour, C.J. the \$2,000 payable at the death of Arthur Mingeaud, payable to the plaintiff, was issued, if issued at all, on the 1st day of June, 1889, and Arthur Mingeaud died on the 19th of November, 1889, and the Act 53 Vic. ch. 39 was not passed till the 7th of April, 1890.

It was not contended, nor could it have been successfully, that the beneficiary certificate of the 28th of January, 1888, was not within the words of 51 Vic. ch. 22, and was not a certificate to which the provisions of the Act R. S. O. ch. 136 was thereby made applicable; but it was contended, and was so held by my brother Street, that, having regard to R. S. O. ch. 172, sec. 11, the rules of the Ancient Order of United Workmen were not affected by the passing of the Act 51 Vic. ch. 22. But to this, with great respect for my learned brother, I cannot agree.

I am of the opinion that the effect of the Act 51 Vic. ch. 22 was to make the certificate of the 28th of January, 1888, subject to the provisions of the Act R. S. O. ch. 136, and that the rules, in so far as they are inconsistent with such provisions, must be held to be modified and controlled by them; and being subject to such provisions, that such certificate became a trust for the defendants, under the provisions of sec. 5 of the said Act, and ceased, so long as the objects of the trust remained, to be under the control of Arthur Mingeaud, except only in accordance with the provisions of secs. 5 and 6 of the said Act, which did not authorize him to revoke the said certificate, and to replace it by the certificate of the 1st day of June, 1889, as he essayed to do.

In my opinion, therefore, judgment should be entered for the defendants.

[This case has been carried to the Court of Appeal.]

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## [QUEEN'S BENCH DIVISION.]

## RE TIPLING V. COLE.

*Prohibition—Division Court—Judge reserving judgment without naming day—Garnishee summons—R. S. O. ch. 51, sec. 144—Acquiescence.*

Section 144 of the Division Courts Act, R. S. O. ch. 51, which provides that when a Judge reserves judgment he shall name a subsequent day and hour for the delivery thereof, applies as well to the Judge's decision upon the hearing of a garnishee summons as to his decision in any other case, and must be strictly complied with.

Where a Division Court Judge reserved judgment, indorsing the summons "judgment reserved till," but did not name a subsequent day and hour for the delivery thereof nor adjourn the trial, prohibition was granted to restrain further proceedings, no acquiescence being shown on the part of the applicants.

**Statement.**

THIS was an application by certain garnishees for prohibition to the third Division Court in the county of Huron, in a plaint in that Court wherein Thomas Tipling was primary creditor, Peter Cole primary debtor, and William Striple and others garnishees.

The garnishee summons was duly served on the primary debtor and on the garnishees, and the trial took place on the 25th October, 1889, Mr. Champion appearing for the primary creditor and Mr. Scott for the other parties, and at the conclusion of the trial the Judge reserved judgment, indorsing the summons "judgment reserved till," but he did not name a subsequent day and hour for the delivery thereof in writing at the clerk's office, nor did he adjourn the hearing or trial of the cause.

Mr. Scott in his affidavit stated that from the Judge's remarks he supposed that judgment was to be entered against the primary creditor, and that he had no recollection of any statement being made in Court by the Judge that he would reserve judgment.

Mr. Champion, however, in his affidavit alleged that the Judge stated openly at the close of the argument that he would reserve judgment.

Nothing more was heard of the matter by Mr. Scott until the receipt by him through the post-office of a notice from

the clerk of the Court on or about the 20th of October, 1890, "that this cause will be tried at the next sittings of this Court," and "that the next sittings of Court, when said cause will be heard, will be on the 31st day of October, 1890, at 9 a.m." Statement.

Mr. Scott attended the Court on the 31st day of October, 1890, and the original summons not being in Court he objected that nothing could be done, and on or about the 15th day of December, 1890, he received through the post-office a notice from the clerk of the Court "that this suit will be again heard and judgment given at the next sittings of this Court as below," and "that the next sittings of Court, when said cause will be heard, will be on the 23rd day of December, 1890."

Mr. Scott attended the Court on the 23rd day of December, 1890, and on the case being called took the objection that the Judge had no jurisdiction to proceed further in the matter, on the ground, among others, that he had not pronounced his decision in Court after the hearing, and that he had not adjourned the hearing of the cause, and that he had not named a subsequent day and hour for the delivery of his judgment in writing at the clerk's office, and having taken his objections he withdrew from the case. The Judge thereupon proceeded by calling the clerk, bailiff, and Mr. Campion to testify to what the witnesses had sworn to on the trial, and upon their testimony gave judgment for the primary creditor.

In addition to the words "judgment reserved till" indorsed on the summons, the following were also indorsed :

Feb. 28, 90. Before Court. Nothing done. Adj'd. to next Court. Summs. mislaid.

May 2, 90. do do

October 31, 90. Adj'd. till next Court. Summs. mislaid.

The motion for prohibition was argued before FALCONBRIDGE, J., in Chambers, on the 4th March, 1891.

*Douglas Armour*, for certain garnishees, for the motion.  
*Shepley*, Q. C., for the primary creditor, contra.

Judgment. May 19, 1891. FALCONBRIDGE, J.:—

Falconbridge,  
J.

If sec. 144 of R. S. O. ch. 51\* governs the practice as to reserving judgment in garnishee cases, the prohibition ought to go. There is no case reported where the Judge did not name either day, hour, or place, and in which the judgment was upheld.

The judgment here was not given at the hearing of the summons or at any adjourned hearing. Adjournment implies putting off to another time, *i.e.*, to a day certain.

*Adjournamentum est ad diem dicere seu diem dare*: 4 Inst. 27. An adjournment is to appoint a day or to give a day. Hence the form "*eat sine die*." See Wharton's *Lexicon sub verb.*

This is not a mere irregularity in practice. According to the certificate of the clerk of the Court, the matter lapsed a second time on 28th February, 1890.

Some of the garnishees swear and their solicitor swears that they thought the judgment was going to be given in their favour, and not hearing to the contrary paid their money.

I do not think there was any acquiescence on the part of the garnishees' solicitor. He was in Court on 31st October, 1890, and objected there was no summons in Court, when nothing was done and the case was adjourned.

On 23rd December, 1890, he attended, filed in writing the objections to which I am now giving effect, and withdrew from the case.

The notice to him of this hearing states that "this suit will be again heard and judgment given at the next sittings." No one had applied for a new trial or rehearing.

It cannot, I conceive, be claimed that the learned Judge

\* The Judge in any case heard before him shall, openly in Court and as soon as may be after the hearing, pronounce his decision; but if he is not prepared to pronounce a decision instanter, he may postpone judgment and name a subsequent day and hour for the delivery thereof in writing at the clerk's office; and the clerk shall then read the decision to the parties or their agents, if present, and he shall forthwith enter the judgment, and such judgment shall be as effectual as if rendered in Court at the trial.

postponed or adjourned from time to time under sec. 198 <sup>Judgment.</sup> of the Division Courts Act. If he did, the postponements or <sup>Falconbridge,</sup> adjournments should have been from one time to another <sup>J.</sup> certain time.

I think these proceedings are unauthorized and that the order for prohibition ought to go, with costs against the primary creditor.

The primary creditor appealed against the order of FALCONBRIDGE, J., and his appeal was argued before a Divisional Court composed of ARMOUR, C. J., and STREET, J., on the 2nd June, 1891.

*Shepley*, Q. C., for the appellant. Sec. 144 of the Division Courts Act, R. S. O. ch. 51, does not apply to garnishee cases. Sec. 198 governs this case, and sec. 304 also applies. The garnishees have acquiesced. I refer to *In re Burrows*, 18 C. P. 493; *Re McLean v. McLeod*, 5 P. R. 467; *Re Smart and O'Reilly*, 7 P. R. 364; *In re Leibes v. Ward*, 45 U. C. R. 375; *Fee v. McIlhargey*, 9 P. R. 329; *Re McKay v. Palmer*, 12 P. R. 219; *Re Backhouse v. Bright*, 13 P. R. 117.

*Douglas Armour*, for the original applicants, contra. relied on sec. 144 and *In re Howley v. Young*, 7 C. L. T. Occ. N. 346.

June 19, 1891. The judgment of the Court was delivered by

ARMOUR, C. J. (who, after stating the facts as above, proceeded):—

The order appealed from is, in my opinion, right, and ought to be affirmed.

Section 144 of the Division Courts Act applies as well to the Judge's decision upon the hearing of a garnishee summons as to his decision in any other case. Such a hearing is clearly within the words of that section, and no reason can be given why his decision upon such a hearing should be given in any different manner from that prescribed by that section, nor in any different manner from his decision in any other case.



Judgment. That section is a most necessary and essential provision, and should not be in any way impaired, and a strict compliance with it should always be observed and enforced.

There was nothing in the conduct of Mr. Scott which precluded him from taking the objection as and when he did. He did not wait until after judgment and take the chances of the judgment being in his favour, but he took the objection as soon as the Judge attempted to proceed with the matter with the summons before him, and before the Judge took any proceeding therein.

The appeal must, in my opinion, be dismissed with costs.\*

\* In *Re McPherson v. McPhee* an application for prohibition was made by the defendant before STREET, J., in Chambers on the 18th August, 1891. The applicant relied on *Re Tipling v. Cole*, supra.

The following judgment was delivered by STREET, J., on the 20th August, 1891 :—

This is an application for a prohibition to the eighth Division Court of the county of Wellington by a primary debtor to stay proceedings upon a judgment against him for \$44, upon the ground that judgment was reserved at the trial by the Judge, and that he did not fix any day and hour for giving judgment, but simply indorsed on the summons "judgment in a week."

It appears that the learned Judge did give his judgment upon the day indicated in his indorsement, and that the judgment was against the defendant for \$44, and was brought to his knowledge; that he thereupon made an application upon the merits for a new trial or to set aside the judgment; that his application was duly made within the time allowed, was considered by the Judge, and was refused.

Under these circumstances no harm has been done by the omission of the learned Judge to fix an hour as well as a day for the delivery of his judgment, and the irregularity has been waived by the application of the defendant within due time to the Judge, upon the merits, and without any reference to the objection now raised.

The case is very different in its facts from that of *Re Tipling v. Cole*, decided during last term by the Divisional Court of the Queen's Bench Division. In that case there was no waiver such as is here shewn. This case also differs from *Re McGregor v. Norton*, 13 P. R. 223, in which an application to set aside a judgment obtained by the plaintiff in the face of a statutory stay of proceedings was held not to prejudice the defendant's right to obtain a prohibition, and to insist upon the statutory stay. See *Re Smart and O'Reilly*, 7 P. R. 364.

In the present case the Judge is by the statute directed when he reserves judgment to fix a day and hour for delivering it. If he fail to do so and any party is prejudiced by the delivery of judgment without notice to him, there is ground for a prohibition. Here, however, there was no prejudice, because the defendant became aware of the judgment in due time to enable him to move against it, and there is therefore no ground for objection by him.

The motion must be dismissed with costs.

## [QUEEN'S BENCH DIVISION.]

## MARSH ET AL. V. WEBB ET AL.

*Title to land—Adverse possession—32 H. VIII. ch. 9—Husband and wife—Estoppel—Subrogation.*

In 1841 land was granted by King's College to G., who in 1849 conveyed it to a married woman, who, with her husband, was in possession at the time of the grant to G. The conveyance to the married woman was executed by her husband. The husband and wife lived together on the land till her death, in 1864, and the husband till 1870, he dying in January, 1889. In an action of ejectment begun in October, 1889, by the heirs-at-law of the wife against persons claiming through the husband :—

*Held*, reversing the judgment of ROSE, J., that the possession of the husband was not adverse at the time of the conveyance to G., and the conveyance to G. and the subsequent conveyance to the wife were operative, notwithstanding the statute 32 H. VIII. ch. 9, then in force.

*Per* ARMOUR, C. J.—The conveyance to the wife was made by the procurement of the husband, and he took an estate under it, and having no other right or title to the land, was estopped from denying the validity of G.'s title.

*Held*, also, upon the evidence, that the plaintiffs were not estopped by the dealings of their ancestress with the land; and that the defendants were not entitled to be subrogated to the rights of a mortgagee in whose mortgage she had joined as a granting party, but which had been paid off and discharged.

THIS action was commenced on 30th October, 1889. *Statement.* The plaintiffs were the heirs-at-law of Mary Ann Marsh, and the action was brought to recover possession of five acres of land, being part of the south-west part of lot number 34 in broken concession B. of the township of Murray.

The lot of which the land in question formed part was granted by the Crown to King's College.

On 18th March, 1841, it was granted by King's College to James B. Greenshields in fee.

On 9th May, 1849, James B. Greenshields conveyed the five acres in question to Mary Ann Marsh, wife of George S. Marsh, in fee. This conveyance was executed by George S. Marsh, as well as by James B. Greenshields.

George S. Marsh was in possession of the land at the time of the conveyance by King's College to Greenshields, with his wife Mary Ann Marsh, to whom he was married in 1835. They remained together, living on the land, until

Statement. her death, which took place in 1864. She died intestate, leaving the plaintiffs, her children and grandchildren, her heirs-at-law, and leaving also her husband, George S. Marsh, surviving her; he died on 13th January, 1889.

The defendants' paper title was as follows:—On 12th May, 1858, George S. Marsh conveyed to George Coon, his son-in-law, the five acres in question with other lands, *habendum* to the grantee, his heirs and assigns forever. The five acres were referred to as “particularly described in a certain deed made by James B. Greenshields to Mary Ann Marsh, the wife of the said party hereto of the first part.”

On 27th January, 1859, George S. Marsh and Mary Ann Marsh, his wife, and George Coon joined as mortgagors in a mortgage of the five acres in question to Harvey Fowler, to secure £110. Indorsed upon this mortgage was a certificate of two justices of the peace, in the form then required, of the consent of Mrs. Marsh to convey her estate without coercion on the part of her husband, etc.

On 31st July, 1860, the sheriff of Northumberland and Durham sold to George Coon the interest of George S. Marsh in the five acres in question, with other lands, under writs of execution against George S. Marsh, and a conveyance was at once made in pursuance of the sale.

On 31st July, 1860, George Coon and George S. Marsh and Mary Ann Marsh, as mortgagors, and Elizabeth Ann Coon, wife of George Coon, and Mary Ann Marsh, again, as parties of the second part to bar their dower, conveyed the five acres and other lands by way of mortgage to Harvey Fowler, the elder, to secure payment of \$1,294. The five acres were again described by reference to the conveyance from Greenshields to Mary Ann Marsh, and the usual certificate by two justices of the peace was indorsed.

This mortgage and that of 27th January, 1859, were discharged on 2nd February, 1869.

On 16th January, 1869, George Coon conveyed the five acres in question with other lands by way of mortgage to the Canada Permanent Loan and Savings Company, and

the mortgagees on 8th May, 1873, by virtue of the power <sup>Statement.</sup> of sale in this mortgage, conveyed the same lands to Daniel T. McKenzie, whose widow and children, upon his dying intestate, conveyed to the defendants.

After the death of his wife George S. Marsh appeared to have continued to live upon the place with Coon until 1870; then Coon lived on it; and it finally came into the possession of the immediate predecessor in title of the defendants in the present action, when he purchased.

There was some evidence that George S. Marsh, after the conveyance to his wife, claimed to be owner by length of possession, and there was also evidence that his possession began before his marriage.

The action was tried at Cobourg on 6th May, 1891, before ROSE, J., without a jury. Judgment was given at the close of the evidence in favour of the defendants upon the ground that the conveyance from King's College to Greenshields having been made while the possession was in George S. Marsh, the conveyance was inoperative, the statute 32 Henry VIII. ch. 9,\* against brachery, being still in force at the time it was made.

At the Easter Sittings of the Divisional Court, 1891, the plaintiffs moved to set aside this judgment upon the grounds: (1) That it was not shewn that George S. Marsh at the time of the conveyance from King's College to Greenshields was in possession adversely to King's College; (2) that George S. Marsh was a consenting party to the conveyance to his wife, and was estopped from disputing its validity; and upon other grounds.

\* Section 2 enacts "that no person nor persons \* \* shall from henceforth bargain, buy, or sell, or by any ways or means obtain, get, or have any pretended rights or titles \* \* in or to any manors, lands, tenements, or hereditaments, (except such person or persons, which shall so bargain, sell, give, grant, covenant, or promise the same, their antecessors, or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made) \* \*."



**Argument.**

The motion was argued on 29th May, 1891, before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.

*J. R. Roaf*, for the plaintiffs. I contend that George S. Marsh was not in such adverse possession as to create a separate interest in him. I refer to *Smith v. Hall*, 25 U. C. R. 554; *Bishop of Toronto v. Cantwell*, 12 C. P. 607; *Nicolls v. Madill*, 6 U. C. R. 415; *Beasley v. Cahill*, 2 U. C. R. 320; *Baldwin v. Henderson*, *ib.* 388; *Burns v. Eddie*, *ib.* 286; *Doe McKenzie v. Fairman*, 7 U. C. R. 411; *Gray v. Richford*, 2 S. C. R. 431.

*F. L. Webb*, for the defendants. The defence is the Statute of Limitations, and the defendants would have a title by lapse of time but for the life estate of George S. Marsh, which is supposed to have existed. I contend there was no valid title in Mrs. Marsh: *Partridge v. Strange*, Plowd. 88. Inasmuch as the plaintiffs set up that Mrs. Marsh had the fee simple, and George S. Marsh no interest at all, we should be allowed to say that he was in adverse possession. The plaintiffs are estopped *in pais* by reason of the estoppel against their ancestress. The defendants also say they are entitled to the rights of Fowler, and claim to be subrogated. On the question of estoppel, I refer to *Boulter v. Hamilton*, 15 C. P. 125; *Doe Irvine v. Webster*, 2 U. C. R. 224; *Nelson v. Cook*, 12 U. C. R. 22; *Detlor v. Grand Trunk R. W. Co.*, 15 U. C. R. 595; *Leary v. Rose*, 10 Gr. 346.

*Roaf*, in reply.

June 19, 1891. STREET, J. :—

The ground upon which the learned trial Judge disposed of this case was that the conveyance from King's College to Greenshields was void under the statute of Henry VIII. against the transfer of pretended titles, this view of the law applicable to the case having for its necessary basis the finding of fact that Marsh was in adverse possession at the time the conveyance was made. His conclusion was that that conveyance being invalid by reason of the sta-

tute and the adverse possession of Marsh at the time it was made, nothing passed under it to Greenshields, and therefore nothing could pass from Greenshields under his conveyance to Mary Ann Marsh.

Judgment.

Street, J.

The evidence of adverse possession and claim by George S. Marsh consists in statements to be found in the testimony of Isaac M. Wellington, a witness examined at the trial, and in that of Bernard Devlin, who was examined under commission. The former witness merely states that Marsh was living on the property, and claimed it as his own in 1837. Devlin states that Marsh claimed the property by possession; that the witness's grandfather, who appears to have claimed the land, wanted him to go off, but he refused to go off; and that when the survey was being made for the purpose of the description in the deed to Mrs. Marsh, a few days before that deed was made, he again referred to it as property he claimed. Against this we have the very strong circumstance that Marsh was a consenting party to the conveyance by Greenshields to his wife, testified by his affixing his seal and signature to the instrument, although he was not named as a party to it. This appears to me to be an act of such significance as to outweigh beyond any question the vague recollections of the witnesses to whom I have referred. This is followed by repeated instances of his assent to the vesting of the title in her by Greenshields; he executes or joins in conveyances in which the five acres are described as the land "particularly described in the conveyance from James B. Greenshields to Mary Ann Marsh;" and he makes her a party granting this property jointly with himself. Under these circumstances, in my opinion, it is clear that the finding as to the possession of Marsh should be one which would support rather than one which would destroy the validity of the conveyance to Greenshields and of Mrs. Marsh's title, and that we should therefore find his possession to have been not adverse to but consistent with the paper title.

This being found, there is nothing to bar the plaintiffs' right to possession.

Judgment.

Street, J.

There is no evidence upon which we could find that Marsh had been in possession as owner for twenty years before the conveyance to his wife in 1849; she was living with her husband upon the land at that time, and his possession thenceforward must be treated as rightful, and not wrongful. He was in as tenant by the curtesy initiate; then in 1860, when the sheriff sold his estate in the land to Coon, his son-in-law, he and his wife still remained in possession, their possession being as tenants at will, probably under Coon, the owner of the life estate. This life estate continued until Marsh's death in 1889, whereupon the right of the heirs-at-law of the wife came into possession.

I can find nothing which could be treated as estopping Mary Ann Marsh or her heirs-at-law from claiming the land. She was aware of the sheriff's sale, but the sheriff professed to sell only the interest of her husband in the land, and she joined with him in conveyances of the fee of this land, but she owned the fee subject to his life estate.

The defendants' counsel contended upon the argument and in his motion paper that his clients were at all events entitled to be subrogated to the rights of the Canada Permanent Loan Company, from whom their immediate predecessor in title purchased, but I can find no principle upon which this argument can be supported. The matter stands thus: Marsh, having a life estate only, conveyed it to Coon, and Marsh and his wife (the wife being entitled to the reversion in fee), joined with Coon in a mortgage to Fowler for £110; then the sheriff sold Marsh's life estate to Coon, and Marsh and his wife again joined with Coon in a mortgage to Fowler of the land in question and other lands. The mortgages to Fowler were to raise money, practically to pay debts of Marsh's. These mortgages were paid by the Canada Permanent Loan and Savings Company, when they took, themselves, a mortgage of the land in question and other lands from Coon alone, and the former mortgages were discharged. These former mortgages were not for any debt of Mrs. Marsh's; at most her

estate was pledged as security for a debt of her husband's, and that debt having been paid off by Coon, and her estate in the land having been freed from the charge, it is entirely too late for Coon, or for any one claiming under him, or for the Canada Permanent Company, or any one claiming under them, to assert a right to revive the liability against Mrs. Marsh's estate in the hands of her heirs.

Judgment.

Street, J.

I think, therefore, that judgment should be entered for the plaintiffs, declaring them entitled to the possession of the land, and that they should have the costs of the action and of the motion.

ARMOUR, C. J. :—

I agree in the result of my brother Street's judgment. The fair result of Devlin's testimony appears to me to shew that he and George S. Marsh were in possession, he of ninety-six acres, and George S. Marsh of four acres, of the west half of lot 34 in concession B. of Murray, neither of them having any title to the part of which he was in possession. That Mr. Meyers, acting as attorney for Greenshields, had brought an action of ejectment to recover possession of the said west half against Devlin (and it may be against George S. Marsh also, although there is no evidence of this). That afterwards Meyers, George S. Marsh, and Devlin met together, and an agreement was entered into that George S. Marsh should buy from Greenshields five acres, that is, an additional acre to the four acres of which he was in possession, in order to give him access to the creek and street, and that Devlin should buy the remaining ninety-five acres. That a few days after Mr. Meyers brought the deeds executed by Mr. Greenshields according to the agreement, and the agreement was carried out by the delivery of these deeds, and then for the first time Devlin became aware that the deed of the five acres had been made to George S. Marsh's wife. That Devlin, George S. Marsh, and Meyers were all present when the deeds were delivered, and George S. Marsh signed and sealed the deed to his wife in his presence.



Judgment. Now, there was nothing at the common law to prevent the person in possession of land from buying and taking a conveyance of the title of any other person not in possession, and 32 Henry VIII. ch. 9, sec. 4, provides "that it shall be lawful to any person or persons being in lawful possession by taking of the yearly farm, rents or profits, of or for any manors, lands, tenements, or hereditaments, to buy, obtain, get, or have, by any reasonable ways, or means, the pretended right or title of any other person or persons, hereafter to be made to, of, or in such manors, lands, tenements, or hereditaments, whereof he or they shall so be in lawful possession; anything in this Act contained to the contrary notwithstanding."

Armour, C.J.

It is quite clear that the deed was made to George S. Marsh's wife by his appointment and procurement, and after the delivery of this deed George S. Marsh held the land thereby conveyed in right of his wife, and must be presumed to have been in possession by virtue of the estate in the land which he acquired by virtue of the deed to his wife. George S. Marsh, having accepted from Greenshields the said estate, and having no other right or title to the land, was estopped from denying the validity of Greenshields' title, and the defendants claiming under him are in no better position than he was, and are equally estopped. See the judgments of Patterson, J. A., and Moss, J. A., in *Gray v. Richford*, 1 A. R. 112; and *Gray v. Richford*, 2 S. C. R. 431.

[This case is to be carried to the Court of Appeal.]

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## [QUEEN'S BENCH DIVISION.]

## RE MCGUGAN V. MCGUGAN ET AL.

*County Court—Equity jurisdiction—32 Vic. ch. 6, sec. 4—Judicature Act—Qui tam action by ratepayer of school section to recover moneys improperly paid out by trustees—"Personal actions"—R. S. O. ch. 47, sec. 19—Power to transfer to High Court—R. S. O. ch. 47, sec. 38—Prohibition—Solicitor and client—Bill of costs—Public school board—Ratepayer applying for taxation—R. S. O. ch. 147, sec. 42—Rule 1229—R. S. O. ch. 225, sec. 39—Duty of auditors of school section.*

Since 32 Vic. ch. 6, sec. 4, the County Courts have had common law jurisdiction only; the Judicature Act did not alter the jurisdiction of those Courts, but only made applicable to matters cognizable by them the several rules of law thereby enacted and declared.

An action by a ratepayer of a school section, on behalf of himself and all other ratepayers, against trustees of the section, seeking to compel the defendants to pay to the treasurer of the section such amount as might be disallowed upon taxation of a bill of costs paid by the trustees to a solicitor, is one of purely equitable jurisdiction, and is not cognizable by a County Court, even though the amount in question is not more than \$200.

The term "personal actions" used in R. S. O. ch. 47, sec. 19, means common law actions.

If a County Court has no jurisdiction over the plaintiff's cause of action, the proceedings in respect thereof in that Court are all *coram non judice*, and the Judge of that Court has no power over them; sec. 38 of R. S. O. ch. 47 applies only where the action in which the equitable question is raised is within the jurisdiction of the County Court.

Prohibition granted to restrain a Judge from transferring to the High Court an action brought in a County Court for an equitable cause of action.

A ratepayer of a school section is entitled under R. S. O. ch. 147, sec. 42, to a taxation of a bill of costs rendered by a solicitor to and paid by the school board of the section, notwithstanding that the accounts of the section have been duly audited and passed under sec. 39 of R. S. O. ch. 225.

*Re Barber*, 14 M. & W. 720, distinguished.

*Ex p. Bass*, 17 L. J. Ch. 219; 2 Phil. 562; *Re Skinner*, 13 P. R. 276, 447, followed.

*Semble*, even if sec. 42 did not apply, a ratepayer would be entitled to a taxation under Rule 1229.

AN action was brought in the County Court of the Statement.  
county of Elgin by John McGugan against Alexander McGugan and Richard Hopkins. The statement of claim alleged that the plaintiff was a ratepayer of school section No. 7 of the township of Southwold, and that he sued on behalf of himself and all other ratepayers of the section; that the defendants were in the year 1889, along with another man, trustees of the

## Statement.

school section, and as such it was their duty properly to disburse all school moneys for the purpose of the school section; that the defendant Alexander McGugan and other ratepayers of the school section brought an action in the High Court against the school board and others, and in the conduct of that action employed a solicitor who was also solicitor for the school board and had steps in their own interest taken ostensibly on behalf of the board in the name of another solicitor, and the costs thereof charged to the board; that the costs charged against the board were exorbitant and were for work done for the defendants in their private capacity and not in the interest of the board or of the school section, and the defendants paid to their solicitor out of the school section moneys \$200 for which there was no legal claim against the board; that these acts were done by the defendants maliciously and without reasonable or probable cause. The claim was to have the bill of costs delivered to the board by the solicitor referred to a taxing officer for report thereon, and that judgment might be entered declaring the defendants liable to, and ordering them to, repay the amount that might be disallowed, to the treasurer for the school section, and for further and other relief.

The defendants admitted that they were trustees of the school section and pleaded "not guilty by statute."

The bill of costs in question, as delivered by the solicitor to the school board, amounted to \$273.84, for which, at the foot of the bill, the solicitor offered to take \$255, and that sum was paid to the solicitor by the school board. The solicitor who rendered the bill was the one in whose name the defence of the former action was conducted.

The Judge of the County Court refused to try the action on the ground that it was not within the jurisdiction of the County Court, but he held that he had power to transfer the case to the High Court, and pronounced an order transferring it.

Before any order was issued, the defendants applied to the High Court for an order prohibiting the County Court

Judge from transferring the action to the High Court or from further proceeding in the action. Statement.

The plaintiff made a cross-motion for a summary order referring the bill of costs in question to taxation, making the solicitor who delivered the bill and the other solicitor mentioned in the statement of claim parties to the application.

Both motions were argued together before ROSE, J., in Chambers on the 14th November, 1890.

*J. A. Robinson*, for the plaintiff.

*Crothers and Glenn*, for the defendants.

ROSE, J., dismissed the motion for taxation with costs, at the time of the argument, but he reserved judgment upon the other motion.

November 15, 1890. ROSE, J.:—

*McGillicuddy v. Griffin*, 20 Gr. 81, and *Morrow v. Connor*, 11 P. R. 423, are not, I think, in the defendants' favour. These cases shew, I think, that the action, in form, is one which may be brought in the County Court unless the claim is beyond the jurisdiction.

All the plaintiff undertakes to shew here is that the defendants have improperly paid to their solicitors a sum of \$200 for costs incurred in certain litigation, which costs were incurred for the benefit of the defendants personally.

To prove this it will not be necessary for the plaintiff to do more than to prove payments of various charges which were made for services rendered for the defendants' benefit and not for the protection of the trustees. That the defendants have paid other or larger sums or that the sums claimed as improperly paid are items in a bill containing other items does not seem to me to make any difference. If, for instance, the plaintiff charged the improper payment of a sum of \$5, say for advising on any matter, could he be forced to go into the High Court



Judgment. because that was paid along with other items amounting  
Rose, J. to over \$200?

Nor do I think that the objection urged by Mr. Crothers, that the Public Schools Act, ch. 225, R. S. O., sec. 39, affords a mode of ascertaining payments improperly made and collecting them from the persons making them, is tenable. The reply of Mr. Robinson is, I think, the proper one. First, that the right of action existed prior to that Act, and has not been taken away; and, second, that the clause would afford a defence, if at all, only where proceedings are had upon objections taken by the auditors and a decision arrived at.

Certain difficulties which upon the argument were suggested seem to me to be matters of defence.

I am not saying that the plaintiff has, on the facts, a good cause of action, or that the action is in proper form as to parties or otherwise. Certain difficulties may be in the plaintiff's way. I do not say that they are, but it seems to me that the County Court would have jurisdiction to entertain the action, and therefore that the learned Judge had jurisdiction to make the order transferring the case to the High Court; and that this motion fails.

The costs will be in the cause to the plaintiff in any event.

During the Michaelmas Sittings, 1890, of the Divisional Court the defendant Hopkins obtained leave to set down a motion by way of appeal from this decision of ROSE, J., and the plaintiff thereupon made a cross-motion by way of appeal from the order of ROSE, J., refusing his motion for taxation, making the solicitors parties to the application.

Both motions were argued before the Divisional Court (ARMOUR, C. J., and STREET, J.), on the 4th December, 1890.

Glenn, for the defendant Hopkins. This is a *qui tam* action for breach of trust and for an account, and is an

action of an equitable character not cognizable in the *Argument*. County Courts. I refer to *Morrow v. Connor*, 11 P. R. 423; *Martin v. Mitchell*, 1 Ch. Chamb. R. 384. The County Court, not having jurisdiction, an order could not be made for the transfer of the action to the High Court. Sections 22, 23, and 38 of R. S. O. ch. 47 do not apply; they apply to cases where the County Court has jurisdiction in the first instance. I refer to *Meyers v. Baker*, 26 U. C. R. 16; *O'Brien v. Welsh*, 28 U. C. R. 394; *Ferguson v. Sampey*, 10 C. L. T. Occ. N. 110.

*J. A. Robinson*, for the plaintiff. This is a common law action, if the plaintiff chooses to put it in that form; it is an action for damages for maliciously paying out moneys. We can apply equity practice without an equitable form of action. This is not an equitable cause of action. An account is a mere matter of practice. The question of parties is a matter of practice: *Scane v. Duckett*, 3 O. R. 370. The distinction between equity law and equity practice is pointed out in *Phelps v. Prothero*, 7 D. M. & G. 722, 735; and by Rule 1257 the practice and procedure in actions in the High Court of Justice shall apply and extend to actions in the County Courts. The County Courts have still power to grant equitable relief: sections 21 and 28 of R. S. O. ch. 47. Section 38 is unlimited in its terms, and is not confined to cases in the jurisdiction of the County Court. The objection to the jurisdiction should have been taken in the statement of defence. It is now too late to bring a new action in the County Court. Then as to the cross-motion for taxation of the bill of costs; the plaintiff is a ratepayer of the township, and is entitled under section 42 of the Solicitors' Act, R. S. O. ch. 147, to apply for taxation as a party liable to pay the bill: *Re Skinner*, 13 P. R. 276, 447.

*Glenn*, in reply. *Re Barber*, 3 D. & L. 244; 14 M. & W. 720, shews that a ratepayer cannot tax a bill paid out of corporation funds.

Judgment. December 31, 1890. The judgment of the Court was.  
Armour, C.J. delivered by

ARMOUR, C. J. :—

The County Court never had any equity jurisdiction until equity jurisdiction was conferred upon it by the Act 16 Vic. ch. 119, C. S. U. C. ch. 15, sections 33 et seq.; but the provisions of the law conferring equity jurisdiction upon it were repealed by 32 Vic. ch. 6, sec. 4, leaving the County Court with common law jurisdiction only.

The Judicature Act, R. S. O. ch. 44, did not alter the jurisdiction of the County Court, but only made applicable to matters cognizable by the County Court the several rules of law thereby enacted and declared.

The plaintiff's cause of action is one of purely equity jurisdiction, and is not cognizable by the County Court.

The County Court has, no doubt, jurisdiction in all personal actions where the debt or damages claimed do not exceed the sum of \$200, but the term "personal action" is a term signifying, as used in this statute,\* a common law action.

If the County Court had no jurisdiction over the plaintiff's cause of action, the proceedings in respect thereof in that Court were all *coram non judice*, and the learned Judge of that Court had no power over them.

It was said that the learned Judge proposed to transfer the cause to the High Court under section 38 of the County Courts Act, which provides that "If it appears to a County Court or a Judge thereof that any equitable question raised in an action or other proceedings in such County Court, cannot be dealt with by the County Court," etc., "the Court or Judge may order the action or proceeding to be transferred to the High Court;" but this section only applies where the action in which the equitable question is raised is within the jurisdiction of the County Court.

\* R. S. O. ch. 47, sec. 19.

The appeal must, therefore, be allowed with costs here and below, and the prohibition must go.

Judgment.  
Armour, C.J.

The question of the right of the plaintiff to have the bill of costs, the subject matter of this litigation, taxed is not properly before us, and we do not therefore deal with it, nor express any opinion in regard to it, but this our decision will be without prejudice to any action that may be taken in respect of it.

The application by the plaintiff for a taxation of the bill was re-argued before the Divisional Court (ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.), on the 27th May, 1891.

*J. A. Robinson*, for the plaintiff. A ratepayer is entitled to a taxation. I refer to R. S. O. ch. 147, sec. 42; 6 & 7 Vic. ch. 73, secs. 38, 39 (Imp.); *Re Skinner*, 13 P. R. 276, 447; Marshall on Costs, 2nd ed., p. 222, citing *Re Barber*, 3 D. & L. 244; 14 M. & W. 720; *In re Dawson*, 8 W. R. 554; *Ex p. Bass—Re Stephen*, 2 Phil. 562.

*Glenn*, for the defendants and the solicitors, contra. This is not a case within the statute. *Re Barber* is directly in point. I refer also to *In re Press and Inskip*, 35 Beav. 34; *In re Jackson*, 58 L. J. Ch. 387; Marshall on Costs, 2nd ed., p. 219, where *Ex p. Bass* is cited; *Re Leadbitter*, 10 Ch. D. 388. Then, by section 39 of the Public Schools Act, R. S. O. ch. 225, it is the duty of the auditors of the school section to decide whether the trustees have duly accounted for and expended the moneys received by them.

June 19, 1891. ARMOUR, C. J.:—

This was an appeal from the order of ROSE, J., dismissing a motion made by John McGugan, a ratepayer of school section No. 7 of the township of Southwold, for an order referring for taxation to the local registrar at St. Thomas a bill of costs delivered by James M. Glenn and Thomas William Crothers, gentlemen, solicitors of this



Judgment. Court, to the board of public school trustees for school Armour, C.J. section No. 7, of the township of Southwold, in the county of Elgin, in December, 1889.

The costs were incurred by the said Board in the defence of the action of McGugan against that Board, reported in 17 O. R. at page 428, and the said costs were, after the delivery of the bill thereof, paid by the said board and charged to the said school section and paid out of the funds thereof.

The said appellant was, at the time the said bill of costs was incurred, charged and paid, and has ever since continued to be and still is a ratepayer in the said school section. The said board of school trustees refuse to have the said bill of costs taxed, and the appellant as such ratepayer seeks to have a taxation thereof.

And his application is resisted upon two grounds: 1st, that the appellant does not come within R. S. O. ch. 147, sec. 42; and 2nd, that the taxation of the bill of costs herein was a matter for the auditors under R. S. O. ch. 225, sec. 39, and could only be dealt with in the manner provided by that section.

I am of the opinion that the words of section 42, R. S. O. ch. 147, are sufficiently wide to cover this case.

The ratepayers of the school section were the persons liable to pay this bill of costs, and are the persons who have paid it, for the amount of it was leviable upon them by rate, and has been so levied and collected. And the appellant, as one of these ratepayers, is entitled to a taxation of this bill of costs, if they are: *Re Dawson*, 6 Jur. N. S. 878.

*Re Barber*, 14 M. & W. 720; was relied on as shewing that the ratepayers in this school section were not persons liable to pay; but that case is, I think, distinguishable upon the ground upon which Parke, B., based his judgment, that in that case there was a mixed fund in the hands of the surveyor, consisting partly of the contributions of the ratepayers already in his hands, and partly of rates which he was empowered to make

under the 5 & 6 Will. IV. ch. 50, sec. 27, out of which <sup>Judgment.</sup> he was to pay not only the attorney's bill, but, also <sup>Armour, C.J.</sup> other expenses, penalties, and forfeitures which might be payable out of it; while in this case the amount of this bill was levied directly upon the ratepayers of the school section, together, of course, with the amount necessary to be raised for school purposes proper.

The Lord Chancellor (Cottenham) on appeal from Knight Bruce, V.-C., in *Ex p. Bass—Re Stephen*, 17 L. J. N. S. Ch. 219; 2 Phil. 562, took a wider view than was taken in *Re Barber*, and, although that case was cited to him, held that a shareholder of a provisionally registered railway company was entitled as such to an order for the taxation of a solicitor's bill against the company "as a party liable to pay, or whose money had paid the solicitor's demand."

One of the objects of the Act respecting Solicitors was to make every solicitor's bill of costs subject to taxation, either by the party primarily liable for it, or by the party ultimately liable for it, and this Act should accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of such object; and it would, I think, be putting a very narrow and illiberal construction and interpretation on section 42 to hold that it did not apply to enable the appellant to tax this bill.

My brother Street held in *Re Skinner*, 13 P. R. 276, and this Court afterwards upheld his decision, 13 P. R. 447, that under section 42 the residuary legatees under a will were persons "liable to pay," and as such entitled to have a taxation of a solicitor's bills of costs against the executors of the will, there being in our Act no such provision as that contained in the English Act, 6 & 7 Vic. ch. 73, sec. 39.

It seems to me that if section 42 does not apply to entitle the appellant to tax this bill, he is certainly entitled to a taxation of it under Con. Rule 1229; but, as I have said, I think that he is entitled to it under section 42 of the Solicitors' Act.

Judgment.

**Armour, C.J.** I do not think that the second objection can prevail. There is nothing in R. S. O. ch. 225, sec. 39, to prevent an application such as this, and indeed I doubt if the auditors ought to have allowed the payment of this bill of costs until it had been taxed. The Public Schools Act does not contemplate the payment of bills of costs by the boards of public schools, and it never contemplated the taxation of such bills by the auditors, who must, except in very few cases, be wholly incapable of taxing them. See *Guardians of Poor of Southampton v. Bell*, 21 Q. B. D. 297.

In my opinion, the order appealed from must be reversed with costs here and in Chambers, and the usual order (to be settled by the Registrar) must issue for the delivery and taxation of the said bill.

FALCONBRIDGE, J. :—

I concur.

STREET, J. :—

Section 42 of ch. 147, R. S. O., gives a right of taxation to every person who, not being chargeable as the principal party, is liable to pay or has paid any bill to the solicitor, etc., or to the principal party entitled thereto.

This section appears to have been intended to extend the right of taxation to every person paying a bill of costs, whether liable directly to the solicitor, or only interested as liable to recoup the person directly chargeable by the solicitor.

In the case of *Re Barber*, 14 M. & W. 720, a distinction was drawn by the Court of a somewhat refined character upon the corresponding section in the English Attorneys and Solicitors' Act, and a parish ratepayer was held not entitled to taxation of a bill incurred by the surveyor of highways and paid out of the parish funds, to which as a ratepayer he contributed, upon the ground that the ratepayer was not liable to pay the bill, but only to contribute to the fund out of which the bill was paid.

I prefer to follow the wider interpretation placed upon the section by the Lord Chancellor in *Ex p. Bass*, 17 L. J. N. S. Ch. 219, and by this Division in *Re Skinner*, upon an appeal from the decision in Chambers reported at 13 P. R. 276. I therefore agree with the Chief Justice in the conclusion that this appeal should be allowed with costs, and that the order for taxation should be made.

Judgment.  
Street, J.

[This case has been carried to the Court of Appeal.]

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[COMMON PLEAS DIVISION.]

LYDIA FARMER V. GRAND TRUNK RAILWAY COMPANY.

*Negligence—Workmen's Compensation Act—Accident—Cause of—Conjecture—Release—Amount received from benefit society—Right to deduct.*

Action under the Workmen's Compensation for Injuries Act against a railway company by the deceased's administratrix for damages sustained through deceased's death while engaged, as alleged, in coupling defendants' cars; caused, as alleged, by his being struck by the overlopping lumber on a lumber car, through the absence of stakes in the sockets thereof. There was no direct evidence to shew how the accident happened, it being merely a matter of conjecture:—

*Held*, that the action was not maintainable.

The plaintiff was paid a sum of \$250 by a benefit insurance society in connection with the railway—though a distinct organization, of which deceased was a member. The plaintiff gave a receipt stating that the railway company was relieved from all liability. The deceased's certificate did not profess to be an insurance against accidents, and the railway company were no party to the receipt:—

*Held*, that the receipt formed no bar to the action against the defendants; nor was there any right to deduct the amount received from the benefit society from the sum the plaintiff was entitled to as damages.

*Hicks v. Newport, etc., R. W. Co.*, 4 B. & S. 403 note distinguished.

THIS was an action tried before ARMOUR, C. J., at Stratford, at the Spring Assizes of 1891.

The action was by the plaintiff as administratrix of Christopher O. Farmer. The deceased was employed as a brakeman on the Grand Trunk Railway. He had made preliminary trips in that capacity over the road and was afterwards examined by the assistant-superintendent of the defendant company at Stratford in April, 1889, and re-



**Statement.**      ceived a certificate of fitness from that official to act in that capacity.

The deceased, about the 25th March, 1890, was put on as coupler in coupling cars for the purpose of making up the different trains in the yard at Stratford. The wages he received for that were somewhat higher than those he earned as brakeman.

The action was brought under the Workmen's Compensation Act, charging that by reason of a defect in the plant of the defendants' railway the plaintiff's husband lost his life. The particular defect alleged in the plant, as appeared by the evidence, was that a flat-car, which had been loaded at Palmerston with lumber, had not at its ends any protection to prevent the lumber from slipping backwards or forwards on the car, and that although there were sockets for stakes at both ends of the car, that these sockets were not utilized for stakes, and boards placed in front of stakes to prevent the shifting of the lumber.

The evidence was to the effect that when the particular car referred to left Palmerston station, the lumber was properly piled and was not projecting over either end of the car, and that it was kept in position by stakes put at the sides of the car and cleats connecting the stakes at the top : that when the car reached the yard at Stratford the lumber was apparently in its place, so far as an inspection of it by the officers would indicate. The car was destined for Woodstock, and was put upon a side track ; and, it was alleged, that the deceased lost his life while endeavouring to couple it to four box-cars attached to a shunting engine in the yard on the night of the 25th January, 1890, between ten and eleven o'clock.

From the link and pin having been changed, one of the witnesses named Mills, concluded that Farmer had attempted to make a coupling, and that while trying to make the coupling, the accident happened resulting in his death.

The engine driver stated that the lumber car was from twelve to fifteen feet distant from the last box-car attached to his engine, and he said he had six box-cars attached to his engine when he was backing up.

It was claimed by the plaintiff that the deceased was <sup>Statement.</sup> killed while in the act of coupling the cars by reason of his having struck his head against the lumber, which had slipped in consequence of the absence of stakes in the sockets to hold in the lumber.

The other facts appear in the judgment of MACMAHON, J. The jury found for the plaintiff.

A motion was made by defendants to set aside the judgment entered for the plaintiff, and to enter judgment for the defendants.

In Easter Sittings, May 28th, 1891, *Wallace Nesbitt*, supported the motion. There was no evidence of negligence to go to the jury. It should have been shewn how the accident happened, whereas on the evidence here, it was a mere matter of conjecture. Great stress was laid on the fact of a piece of wool similar to that in the plaintiff's cap being found on the end of one of the pieces of lumber, but this in itself is not sufficient: *Badgerow v. Grand Trunk R. W. Co.*, 19 O. R. 191; *Wakelin v. London and South-Western R. W. Co.*, 12 App. Cas. 41. The case should not have been left to the jury generally, but questions should have been submitted to them as to how the accident happened. Had this been done it would have been impossible for them to have given any finding on the point. The next point is that by the settlement made with the plaintiff under the benefit insurance the plaintiff has contracted herself out of any remedy against the Grand Trunk Railway Company. By the release given by her, she expressly discharged the Grand Trunk Railway Company from all claims for damages, indemnity, or other form of compensation by reason of the accident: *Chitty on Contracts*, 12th ed., 24; *Read v. Great Eastern R. W. Co.*, L. R. 3 Q. B. 555. The deceased was, moreover, guilty of contributory negligence. It was his duty to see that the lumber was in proper position and report any defect to the company. The amount of compensation received from the benefit

**Argument.**

company should have been taken into consideration by the jury and deducted from the amount of the damage which they found the plaintiff had sustained : *Grand Trunk Railway v. Jennings*, 13 App. Cas. 800 ; *Hicks v. Newport, etc., R. W. Co.*, 4 B. & S. 403, *note*; *Beckett v. Grand Trunk R. W. Co.*, 13 A. R. 174, 5. There was no defect in the plant. The condition of the lumber cannot be deemed such a defect.

*Lash, Q. C.*, *contra*. The question of negligence or contributory negligence is a question for the jury, and their finding on the point cannot be interfered with. The condition in which the lumber was in was clear evidence of negligence, and there was no contributory negligence on the deceased's part. The deceased was merely a brakeman, with no experience and no knowledge of any duty to look out for defects and report to the company. More skill is required in coupling, and it is a more dangerous occupation, and accordingly the pay is better. The deceased was directed to make the coupling, and while in the discharge of his duty at the place in question he received the injury which caused his death. The evidence is clear that it was in the act of coupling that the accident happened. The fact of the wool on the end of the piece of lumber being the same as that in his cap was the strongest evidence as to the cause of the accident. It was not attempted to be shewn that the wool could have come from anywhere else than the cap. There was therefore the strongest inference that the deceased met his death while in the act of coupling, being struck by the overlapping lumber. Before the deceased was allowed to enter on the duty of a coupler the danger should have been pointed out to him. It is the same kind of inference as is raised when fire is started from an engine. All that it is necessary to be proved is that the engine was carrying fire, the means of escape of fire, and that the engine was capable of throwing fire to the distance where the fire originated. There was clearly a defect in the plant in the omission to have stakes in the sockets to keep the lumber from shifting. Then, as to the release. The Benefit Company is an entirely distinct organization from the

Grand Trunk Railway Company ; and although the release Argument. contained a clause exonerating the Grand Trunk Railway Company the plaintiff was not bound by it. There was no consideration for it, the plaintiff being entitled to the money absolutely; and, moreover, her attention was not called to the clause. Then, as to deducting the amount received from the benefit society ; this was not the case of a claim for accident, and the cases referred to by the other side therefore do not apply.

*W. Nesbitt*, in reply. The benefit company is, in fact, a trustee of the Grand Trunk, and therefore the Grand Trunk can avail themselves of the release.

June 27th, 1891. MACMAHON, J.:—

There is no positive evidence as to how the accident happened causing the death. But the inference which plaintiff's counsel says the jury have drawn, and which they were entitled to draw—as clearly deducible from Mills' evidence, and the changing of the coupler and pin,—being, that the deceased in order to effect the coupling got between the cars, and that his head was injured between the box car and the lumber on the flat-car which was said to have been projecting over the end, a distance of between twenty and twenty-four inches.

The evidence as to the condition in which the lumber on the flat-car was at the time it entered the yard was all one way. In fact an admission was made by counsel for the plaintiff that the lumber had not shifted up to the time the car was put in the yard ; his contention being that the shifting must have taken place during the time that the shunting was being carried on and about the time that the accident occurred.

There was given in evidence a circular which was stated to have been put up in all freight trains directing the attention of trainmen and shunters to unfortunate accidents which had recently occurred resulting from want of caution in coupling cars, and drawing attention to the rule which



Judgment. is therein copied, "that before stepping in between the cars,  
MacMahon, or between a car and the engine, for the purpose of making  
J. a coupling, they are to examine the drawheads, dead woods, and loads. Loads such as lumber, timber and rails are liable to shift and extend beyond the ends of the cars."

The engineer said that he found on the end of one of the boards on the flat car a piece of wool similar to that of a cap which had been worn by deceased, being imitation Persian lamb; and the inference sought to be drawn from that fact was that the plaintiff had been between the cars endeavouring to couple them at the time when he lost his life. It is possible that the accident may have occurred while he was in that position, but there is no positive evidence of the fact.

The learned Chief Justice in his clear and exhaustive charge to the jury stated that "it was a pretty difficult question under the evidence to say that it was by reason of the stakes not being in the front and rear of the car that the death of the deceased was caused; and, how Farmer actually met his death, was left a good deal to inference."

Beyond the fact that one of the box-cars had passed over the body of the deceased, there is nothing to show how he was killed. Farmer may have put the coupler and pin in place, and been endeavouring to get out of the way of the box-cars as they were being shunted, and slipped falling across the rails, the box-car then passing over him causing his death. Or he might have been hanging on by the ladder at the side of the box-car and fallen off under the wheels and so met his death.

The fact of a piece of wool being found on the end of a board, similar to the material in the cap of the deceased, would afford no evidence that Farmer was between the cars and in the act of coupling them, and was then struck, so detaching a piece of wool from his cap. He may have been adjusting the coupler and pin when the piece of wool, if indeed it came from his cap—was detached therefrom.

The manner in which deceased lost his life must be, to a very great extent, mere conjecture. As, apart from Mills' *supposition* as to when and how the accident occurred, there is no evidence to show that deceased met his death in any other way than by being run over by one of the box-cars as they were being backed into the siding. How his body got across the rails and under the wheels must be mere surmise.

Judgment.  
MacMahon,  
J.

In my view, there was no evidence that ought to have satisfied the jury of the fact sought to be proven, namely, as to how the deceased came by his death; and, until satisfactory evidence on which that fact could be found was presented to the jury, the other question, which would be in a great measure dependent upon it, namely, whether the defendants were guilty of negligence in using defective plant in connection with their railway could not arise.

*Smith v. Baker and Son*, 5 Times L. R. 518; was an action under the "Employers Liability Act," charging that the plaintiff had been injured through a defect in the plant and machinery connected with the defendants' works. The plaintiff was in the bottom of a cutting holding a drill while a man was hammering. On the top of the cutting was a steam crane used for raising earth and stone. A stone was being raised by putting a chain around it, which chain was fastened to a chain on the crane. The stone either broke or the chain slipped, and the stone fell on the plaintiff and injured him.

In the judgment of the Court of Appeal, at p. 519, it is said: "A plaintiff in an action of this kind must show negligence in the defendants causing the injury. \* \* Here it was left wholly in doubt as to how the plaintiff was injured. It was the plaintiff's duty to make that clear. All that was shown was that he was hurt by a piece of stone falling on him, but whether the accident was caused by the breaking of the chain or by the stone breaking in two was not cleared up. Part of the plaintiff's duty was left undone. He did not show that the mischief was connected

Judgment.

MacMahon,  
J.

with any negligence (assuming that there was negligence) on the part of the defendants." \*

See also *Ryder v. Wombwell*, L. R. 4 Ex. 38, cited with approval in *Bridges v. North London R. W. Co.*, L. R. 7 H.L. 213, at p. 221; *Jewell v. Parr*, 13 C.B. 909, per Maule, J., at p. 916; *Gee v. Metropolitan R. W. Co.*, L. R., 8 Q. B. 161, per Cleasby, B., at p. 177; *Metropolitan R. W. Co. v. Jackson*, 3 App. Cas. 193; *Wakelin v. London and South-Western R. W. Co.*, 12 App. Cas. 41, at p. 45; *Badgerow v. Grand Trunk R. W. Co.*, 19 O. R. 191.

One can hardly understand how the deceased could have been crushed between the box-car and the boards on the flat-car, unless the boards were projecting over the end of the car at the time he undertook to make the coupling, in which case the almost inevitable conclusion would be that he was guilty of contributory negligence.

The learned Chief Justice told the jury that in estimating the damages they were not to take into consideration the amount received from the Grand Trunk Railway Insurance and Provident Society by the plaintiff; that is, that from the amount which the jury considered the plaintiff entitled to recover from the Railway Company by reason of her husband's death, they were not to deduct the \$250 received under the certificate of membership held by her husband in the Provident Society. I think the direction was the proper one. Had this been simply an accident insurance, Mr. Nesbitt's contention that under *Hicks v. Newport, etc., R. W. Co.*, 4 B. & S., 403 *note*, the direction should have been to deduct that amount from the sum to which the plaintiff was entitled as damages, would be entitled to prevail. But looking at the 16th sec. of the Compensation to Workmen Act, R. S. O. chap. 141, the provision is spoken of as securing aid "in case of sickness, accident, or death," and is not confined to death resulting from accident.

The 37 Vic. ch. 65 ss. 11 to 15 (D) inclusive, is the Act authorizing the creation of a fund to be called "The Grand Trunk Railway of Canada Superannuation and Provident

\* Reversed by the House of Lords [1891], A. C. 325.

Fund," for the payment to officers and servants in case of sickness, or to their widows or children or other representatives in case of death, and that the Grand Trunk Railway Company, shall contribute annually to the fund such sum as shall be provided by the rules and regulations.

Judgment.  
MacMahon,  
J.

By 41 Vic. ch. 25 s. 2 (D) authority is given to the Grand Trunk Railway Company to make provision for insurance against accidents to its employees; which may include insurance against death, the payment of allowances during any period they may be unable from accident or sickness to follow their ordinary calling, and the providing of suitable medical or surgical attendance.

The certificate granted to Farmer by the Provident Association, does not profess to be an insurance against accidents, and is not therefore affected by *Hicks v. Newport*.

The Provident Society, upon payment of the \$250 to the plaintiff, took from her a receipt (not under seal) stating, that in consideration of that amount received from the Society she released and discharged the Grand Trunk Railway Company from all claims for damages, indemnity, or other form of compensation, on account of the death of her late husband.

The railway company is not a party to the contract between the Provident Society and Farmer; and I do not think the release forms a bar to the action. There is nothing in the 16th section of the Compensation to Workmen Act, which in express terms provides that the sum covered by the certificate shall constitute a bar to an action against the railway company, as contended for during the argument.

The motion must be absolute dismissing the plaintiff's action with costs.

ROSE, J. :—

I agree that the evidence does not disclose the cause of the accident, or the manner in which the deceased came



Judgment. to his death, and therefore that there was no evidence on  
Rose, J. which the finding of negligence could be based.

If questions had been left to the jury possibly the difficulty might have been avoided ; for to a question as to how the accident occurred, I do not think the jury could have given any satisfactory answer.

As to the desirability of leaving questions to the jury, see *Pritchard v. Lang*, 5 Times L. R. 639.

I do not express any opinion upon the questions raised, as to the right to deduct the insurance money, or as to the effect of the insurance agreement as a bar to the action, for, in view of the opinion I have formed as to the right to recover on the evidence, any opinion on the other questions would be merely obiter.

I agree that the motion must be absolute with costs.

GALT, C. J., concurred with MACMAHON, J.

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## [COMMON PLEAS DIVISION.]

THE CORPORATION OF THE TOWNSHIP OF CARADOC V. THE  
CORPORATION OF THE TOWNSHIP OF METCALFE.*Municipal Act—Drainage—Arbitration—54 Vic. ch. 51 (O.)—Effect of.*

The “Act respecting disputes under the drainage laws,” 54 Vic. c. 51 (O.), has not the effect of abrogating pending proceedings before arbitrators who had already been appointed and had proceeded to act.

THIS was an application on behalf of the township of Metcalfe for an order for prohibition restraining His Honour the Judge of the county of Middlesex from nominating a person as arbitrator for the township of Metcalfe, on the ground that the arbitrator previously appointed for the township of Metcalfe had refused to act. Statement.

On May 23rd the motion was argued.

*Follinsbee*, in support of the application.

*W. R. Meredith*, Q. C., contra.

August 25th, 1891. GALT, C. J. :

The question involved in this application is of considerable importance, viz. : What is the effect of 54 Vic. ch. 51, (O.), entitled “An Act Respecting Disputes under the Drainage Laws.”

There is no dispute in this case as to the facts.

It appears that a report was made by the engineer appointed by the township of Metcalfe on the 31st Dec., 1890, which report had reference to the construction of a drain under the “Ontario Drainage Act,” and a copy of that report was served on the Reeve of the township of Caradoc on the 12th day of March, 1891. The township of Caradoc was dissatisfied with this report, and proceedings were taken for a reference to arbitration under the provisions of the Municipal Act and the drainage laws as then existing. The corporation of the township of Metcalfe thereupon

Judgment.

Galt, C.J.

appointed Mr. Fleck as its arbitrator in the said appeal; and the township of Caradoc appointed Mr. Duncan A. Campbell, and those two duly appointed Mr. John McKerricher as third arbitrator in said appeal.

The said arbitrators took upon themselves the burden of the reference and met and adjourned on several occasions, all of which took place before the passing of the Act. Having viewed the premises they met again on the 2nd day of July at the town of Strathroy to proceed with the taking of evidence in the said appeal.

After the arbitrators had met the question was raised as to whether or not the provisions of the statute, to which I have referred, had not had the effect of putting an end to proceedings before the arbitrators.

There was a long discussion before the arbitrators on this subject and Mr. Fleck stated that, unless the question as to the right of arbitrators to proceed was settled, he declined to act. The meeting then adjourned until the 24th of November next.

Under these circumstances, it was absolutely necessary to take proceedings to ascertain whether or not the provisions of the statute respecting disputes under the drainage laws had or had not abrogated the proceedings then pending before the arbitrators. The only way in which this could be done was in the manner taken by the township of Caradoc, or some similar proceedings, on the part of the township of Metcalfe.

A careful perusal of the statute satisfies me that its provisions are entirely prospective. There is no reference in the statute to any matters then being proceeded with before arbitrators, and doubtless there were many in which a great expense had been incurred.

The clause of the statute which seems to have occasioned the most difficulty, was the 4th, which enacts that "the said referee is hereby substituted for the arbitrators, provided for the drainage enactments as aforesaid."

That, however, seems to me to mean only in cases arising after the passing of the Act and after the appointment of

the referee. The statute is not imperative as to the appointment of a referee; it is permissive. It is that "the Lieutenant-Governor in Council may appoint a referee for the purpose of the drainage laws," and until such appointment was made, it is quite clear that the provisions of the statute could have no effect.

Judgment.

Galt, C.J.

On referring to the 5th clause, it will be seen as to the steps which are to be taken before the referee, and has no reference whatever to cases in which arbitrators had been appointed and had already proceeded to act.

In my opinion, therefore, Mr. Fleck is still the arbitrator of the township of Metcalfe; and, as appears from his affidavit, he is quite willing to act as arbitrator after a decision is given respecting the right of arbitrators to act. It is plain that no arbitrator should be appointed by the learned Judge. Consequently this motion must be made absolute. But as it was taken simply for the purpose of obtaining a decision as affecting the construction to be placed upon the statute, I think there should be no costs.

In case Mr. Fleck should hereafter refuse to act as arbitrator, there is no reason why another application should not be made to the learned Judge.

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## [CHANCERY DIVISION.]

## STOTT v. LONDON AND LANCASHIRE FIRE INSURANCE COMPANY.

*Fire insurance—Application for—Materiality—Reasonableness of condition—Warranty—Fire occurring to other properties—R. S. O. 1887, c. 167, s. 114.*

In a form of application for fire insurance the questions were asked, "Have you ever had any property destroyed or damaged by fire? If so, when and where?" also, "Has this risk been refused by any other company, or has any company cancelled a policy or receipt on it?" To both which questions the applicant answered "No;" and signed a memorandum at the foot of the application form whereby he covenanted and agreed with the company that the foregoing was a just, true, and full exposition of all the facts and circumstances in regard to the situation, condition, value, and risk of the property to be insured, and that it should be held to form the basis of the liability of the company and form a part and be a condition of the insurance contract.

As a matter of fact the insured had had other properties, but unconnected with the property now in question, destroyed by fire:—

*Held*, however, that the answer to the first of the above questions was immaterial to the risk:—

*Held*, also, that the answer to the second question was clearly a warranty, having reference as it had to the property to be insured, and the only point for the jury's decision was as to its truth.

**Statement.**

THIS was an action brought by Elizabeth A. Stott, against the London and Lancashire Fire Insurance Company, upon two interim receipts of the defendant company, under circumstances which, with the arguments of counsel are stated in the judgment.

The action came on for trial at the Ottawa Assizes, on May 2nd, 4th, and 5th, 1891, before MacMahon, J., and a jury.

Afterwards, in June, 1891, at Toronto, the plaintiff, moved for judgment.

*McCarthy*, Q. C., and *Wyld* for the plaintiff.

*J. K. Kerr*, Q. C., and *Maclean* for the defendants.

The following were referred to in the argument: by counsel for the plaintiff, *In re Universal Non-Tariff Fire Ins. Co.*, L. R. 19 Eq. 485; *Butler v. Standard Fire*

*Ins. Co.*, 4 A. R. at p. 398-9; *Phillips v. Grand River Mutual Ins. Co.*, 46 U. C. R. 334, 362; *Goring v. London Mutual Fire Ins. Co.*, 10 O. R. 236: by counsel for the defendants, *Sly v. Ottawa Agricultural Ins. Co.*, 27 Gr. 121; *McFaul v. Montreal Ins. Co.*, 2 U. C. R. 59; *Greet v. Citizens' Ins. Co.*, 27 Gr. 121; R. S. O. ch. 167, sec. 114; *London Assurance v. Mansell*, 11 Ch. D. 363, and *Porter on Insurance*, p. 151-2.

Judgment.  
MacMahon,  
J.

August 15th, 1891. MACMAHON, J.

This action was tried before me with a jury at the Ottawa Assizes on the 2nd, 4th, and 5th of May last, and is brought to recover the sum of \$1,700, being the amount covered by two interim receipts issued by the defendant company on the 30th of July, 1890. Receipt No. 11,072 covering a rough-cast building in the sum of \$800 and a frame building in the sum of \$400. And receipt No. 11,073 covering a brick store to the extent of \$500, the properties in both receipts being situate in the village of Stottsville in the township of Nepean, about half a mile from the city of Ottawa.

A fire occurred on the 11th of August completely destroying the insured premises.

The application was made and signed by the plaintiff's husband as her agent, and contained the following questions:

13. "Have you ever had any property destroyed or damaged by fire? If so, when, and where?" The answer was "no."

15. "Has this risk been refused by any other company or companies; or has any company or companies cancelled a policy or receipt on it? Give name of each company and reason for declining or cancelling." The answer was "no."

At the foot of the application and above the applicant's signature is this statement: "And the said applicant hereby covenants and agrees with the said company that the

Judgment.  
MacMahon  
J.

foregoing is a just, true, and full exposition of all the facts and circumstances in regard to the situation, condition, value and risk of the property to be insured, and agrees and covenants that the same be held to form the basis of the liability of the said company, and shall form a part and be a condition of the insurance contract. And it is further agreed that if the agent of the company fill up and sign this application he will in that case be the agent of the applicant, and not the agent of the company."

The following questions were submitted to the jury :

1st. " Was Thomas A. Stott (*a*) acting with the assent of Mrs. Stott when he applied to Stewart (*b*) for insurance in the Eastern Company ? Yes."

2nd. " If you answer the first question in the negative, then was Mrs. Stott made aware that her husband had insured in the Eastern Company at the time the premium was refunded, or before the receipts were returned to Stewart, and did she ratify and confirm what he had done ? Yes . "

3rd. " Did Douglas (*c*) read questions 13 and 15 in the applications or either of them to Stott ? "

4th. " If you find that such questions were read then did Stott make the replies thereto appearing on said applications or either of them ? "

5th. " Was the answer to any of such questions material to the risk ? Yes."

6th. " If the answers or any of them was or were material to the risk, state which one or more of them was or were material."

When the questions were framed No. 14 of the application was included but was afterwards struck out as being immaterial.

The jury not being able to agree as to the answers to the 3rd, 4th and 6th questions were discharged.

(*a*) Thomas A. Stott, was the plaintiff's husband.

(*b*) Mr. J. K. Stewart was the agent of the Eastern Assurance Company at Ottawa.

(*c*) Mr. C. A. Douglas was the agent of the London and Lancashire Company in Ottawa.

At the conclusion of the trial Mr. McCarthy applied to move for judgment for the plaintiff notwithstanding the failure of the jury to answer questions 3, 4 and 6, and the motion was heard in Toronto in June. His contention was that assuming the answer to question 13 to be untrue, it must upon a reasonable and proper interpretation be held to be immaterial to the risk the company was assuming in regard to this particular property to be informed that the applicant had other buildings (with which the risk in question had no connection whatever) insured, and that such buildings had been destroyed by fire.

Judgment.  
MacMahon,  
J.

The other argument was that where there was a representation in the application its materiality was under the law as it formerly stood to be considered and passed upon by the jury, but the former law as to such representations is not now applicable to fire insurance because of the change made by the Insurance Act; and that the only way in which the insured can now be bound is by a condition indorsed on the policy which is subject to the finding of the Judge at the trial that such condition is reasonable. That as the receipts issued by the company are subject to the conditions on the policy, which are merely the statutory conditions, that under such conditions it cannot be held to be material that there was an application by the insured to the Eastern Assurance Company, which was cancelled, and an application to the agent of other companies which he refused.

The warranty at the foot of the application is confined to making the answers given, "a just, true and full explanation of all facts and circumstances in regard to the situation, condition, value and risk of the property to be insured," so that an untrue statement in regard to matters having no connection with the property included in the proposed risk would not be covered by the warranty. And as Skead's Mills (sometimes called Birkton), Johnston's Mills and Mechanicsville, where plaintiff's other properties destroyed by fire were situated, had no connec-



Judgment.  
MacMahon,  
J.

tion with the property covered by the policy issued by the defendant company and having regard to the Insurance Act (R. S. O. ch. 167, sec. 114, sub-sec. 1), and likewise the first condition indorsed on the policy, and also to the cases of *Butler v. Standard Fire Ins. Co.*, 4 A. R. 391, and *In re Universal Non-Tariff Fire Ins. Co.*, L. R. 19 Eq. 485, where a condition similar in its terms to the first statutory condition in our own Act was considered, I must hold that as far as the answer to the thirteenth question has reference to the fires above referred to, such answer was immaterial to the risk.

The plaintiff purchased the brick building from the Civil Service Building Society, agreeing to pay \$2,000 therefor, and having paid \$100 on account, entered into possession, and remained in possession for nearly three years, when a fire occurred completely destroying the building, which was insured for \$2,500, the amount of the loss being paid to the building society, who thus received the balance of the purchase money payable to it. There was an agreement for sale and purchase between the building society and the plaintiff, and as it is not in evidence that the property was insured by the plaintiff, I assume that the building society insured or continued the insurance on the building for its own protection. After that fire the conveyance was made to the plaintiff, who rebuilt, erecting the brick building mentioned in application number 11,073 valued therein at \$5,000, and insured for \$500. There was no evidence that the plaintiff had effected an insurance at that time.

There was no property belonging to the plaintiff destroyed by the fire in this brick building on the 12th of July, 1890. A wood-box belonging to Mrs. Brownlee, a tenant of part of the building was on fire and partly burned. The building was not injured.

Under the authorities referred to I must hold that there is nothing in the answer to question 13 relating to the fires before the conveyance by the building society to the plaintiff, which can be considered material to the risk.

There are doubtless cases when it must be important to an insurance company to be informed of fires by which the property of proposed insurees was destroyed, in order to enable the company to judge of what is known among underwriters as the "moral risk" being incurred by the acceptance of the proposal for insurance. But I am now dealing with the legal question under the statute and conditions.

Judgment.

MacMahon,  
J.

Mr. Culbert who was the agent of five insurance companies refused to insure the buildings, and a few days after John K. Stewart as agent for the Eastern Assurance Company having issued interim receipts covering these properties he refunded the premium and demanded and had delivered up to him such receipts to be cancelled.

The answer to question No. 15 was clearly a warranty. See *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *In re Universal Non-Tariff Fire Ins. Co.*, L. R. 19 Eq. 485, where the authority of *Anderson v. Fitzgerald*, is considered in relation to five insurance policies; and also *London Assurance v. Mansel*, 11 Ch. D. 363, at pp. 367 and 369. If the question was read to Stott, and if my view is correct that it is a warranty, then the only point for the jury's decision is as to its truth.

The costs of this motion will be costs in the cause to the defendants in any event.

A. H. F. L.

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## [CHANCERY DIVISION.]

## MITCHELL V. LISTER (2).

*Partnership—One partner taking orders for his own benefit—Remedies—Account—Damages—Costs of partnership action.*

Where articles of partnership bound the parties to be just and true to each other, and to devote their time diligently to the concerns of the firm, and not to engage in any other business; and it appeared that after notice of dissolution had been given, one of the partners had taken orders on his own account to be filled by him after the termination of the partnership :—

*Held*, that his co-partner had no equity to compel him to account for the profits of the business thus done by him.

The remedies in such a case are by injunction, or by action for damages. *Dean v. McDowell*, 8 Ch. D. 345, followed.

The fact that in an action to take the accounts of a partnership, one partner has succeeded in his contention as to such accounts as against the contention of his co-partner, is not sufficient to entitle him to the costs of the action against the latter.

*Chapman v. Newell*, 14 P. R. 208, followed.

## Statement.

THIS was a motion for further directions and costs in the partnership action referred to, *ante* p. 22.

The facts of the case sufficiently appear from the judgment.

The motion was argued on June 17th, 1891, before ROBERTSON, J.

*Worrell*, Q. C., for the plaintiff.

*Armour*, Q. C., for the defendant.

The following authorities were cited on the argument: for the defendant, *Chapman v. Newell*, 11 P. R. 308; Lindley on Partnership, 5th ed., pp. 305, 307-8, 312, 517; for the plaintiff, *Dean v. McDowell*, 8 Ch. D. 345.

September 1st, 1891. ROBERTSON, J.

Motion for further directions and costs in a partnership action, the accounts having been taken by the Referee, who has reported thereon as follows:

[The learned Judge then set out the report of the Referee, finding the state of the accounts between the plaintiff and defendant in respect to the partnership Mitchell & Lister Co., and certifying specially at the request of the plaintiff, that upon proceeding on the said accounts, the plaintiff sought to charge the said partnership firm with a sum for goods sold and delivered by the firm of C. J. Mitchell & Co. to one Radcliffe, prior to January 1st, 1889, the date of the articles of partnership, and with a further sum for goods ordered from C. J. Mitchell & Co. by said Radcliffe before but not delivered until after said date, and finding that the plaintiff was not entitled to charge the firm of Mitchell & Lister Co. with either of the said sums; and further certifying at the request of the defendant, (1) that besides the disposal of the assets and the question of charging the plaintiff with business done on his own account during the partnership, there was no question of account between the parties, save as to whether the loss on the above-mentioned Radcliffe account (which he found was one of the liabilities of C. J. Mitchell & Co.) had been assumed by or was chargeable to the firm of Mitchell & Lister Co.; (2) that after the notice of dissolution was given by the parties and during the currency of the firm, the plaintiff took orders on his own account to be filled by him after the termination of the partnership to the extent of \$2,160.46, part of said orders being taken by himself and part by travellers employed by him, the estimated profits on which orders was \$432. The learned Judge then proceeded:—From this report the plaintiff appealed, and the result was that so much of the appeal as relates to the amount owing by the said F. W. Radcliffe for goods delivered to him after January 1st, 1889, was allowed and the report was referred back to the Referee for the purpose of amendment accordingly.

Upon this the Referee then reported that he found as follows:

1. There is to the credit of the plaintiff on capital account the sum of \$5,431.30, and at his debit on profit and loss account the sum of \$4,981.07,



**Judgment.** after charging him with the proportion of the Radcliffe loss as directed by the said order, leaving a balance due to him of \$450.23.

**Robertson, J.** 2. There is to the credit of the defendant Lister on capital account the sum of \$5,480.17, and at his debit on profit and loss account after charging him also with a share of the Radcliffe loss as by said order directed, the sum of \$3,012.61, leaving a balance due to him of \$2,467.56.

3. The said defendant Lister is entitled to be first paid out of the moneys in Court \$2,017.33, and the balance of the moneys in court is divisible equally between the partners.

It is now contended by the plaintiff that the only dispute between the parties being occasioned by the defendant disputing his rights to have the Radcliffe account charged to the new firm, and the plaintiff having succeeded is entitled to have his costs paid by defendant.

I don't think myself that this is of itself sufficient to entitle the plaintiff to the costs against the defendant. It is true he has to a certain extent been successful in his contention, but even had he succeeded to the full amount, it was a dispute as to accounts between partners—it is only when there are such disputes—or some misunderstanding, that it becomes necessary to invoke the aid of the law; if there had been no contention of the kind of course an action would not have been necessary, and all expense might have been avoided, but I think the case is concluded by *Chapman v. Newell*, 14 P. R. 208, and I cannot express my own view in language more appropriate than that of the learned Chancellor, in that case, who at p. 209, says: "Difficulties in accounting exist in most partnerships, and in the present instance these formed the source of this action and the reference. \* \* It is not well to introduce any new principle of apportioning costs in actions of this administrative character, and clearly there is no ground for awarding the costs of this action to the plaintiff, as claimed on further directions."

The next question is raised by the defendant; he says, according to the special report of the Referee, the plaintiff has been guilty of gross misconduct, and has acted in violation of the trust which one partner confides in another, and he points out that during the existence of the partner-

ship the plaintiff was engaged in the same description of Judgment.  
 business, and has not accounted to the defendant for his Robertson, J.  
 share of the profits of that business—which the Master has  
 estimated at \$432,—and the defendant now asks to have  
 the plaintiff charged with these estimated profits.

The twelfth paragraph of the articles of copartnership is in these words :

“ That each of the said partners shall be just and true to each other in all matters of the said business, and will devote their whole time diligently and faithfully to the concerns of the same, and will not at any time during their copartnership engage in any other business whatever outside of that already existing.”

The plaintiff excuses himself from this charge on the ground, that at the time the orders referred to were taken, notice of dissolution of the partnership had been given, and that owing to the nature of the business in which they were engaged, these and such like orders had to be taken in advance, in order to get them filled in the old country and if neither party was allowed to take such orders pending the notice of dissolution, neither would have any business of that description to do, at the time of the dissolution ; and besides that such a transaction cannot be characterized into a breach of trust, or anything akin to it, to, entitle the defendant to costs from the plaintiff, and *Dean v. McDowell*, 8 Ch. D. 345 is relied on. The only claim the defendant could have would be in the nature of damages for not devoting the whole of his time to the concerns of the partnership, and here the orders were chiefly taken by travellers who were paid by the plaintiff and not by the firm.

In *Dean v. McDowell*, by the eighth clause of the articles of copartnership, the partners mutually covenanted in terms almost exactly the same as the partners in this case have done, but there was another clause, which went further and would go to meet this case, if anything of the kind would meet it. It was as follows :

Judgment.     “Neither of them the said C. A. McD. and R. R. D. Robertson, J. shall, either alone or with any other person, either directly or indirectly, engage in any trade or business except upon the account and for the benefit of the partnership, but the said R. Dean may engage in any other trade or business if he shall think fit.”

The partnership was carried on by the parties until 1st March, 1873, when it expired by effluxion of time. Shortly afterwards Dean discovered that McDowell had during the last two years of the partnership been engaged actually, though not ostensibly, as partner in a firm of *Ashton & Sons*, who were carrying on business as salt manufacturers: the name of the defendant's son, a youth without capital, having been used in the business as nominee and representative of the defendant, who himself contributed the necessary capital. This partnership expired by effluxion of time on March 31st, 1873, and then the defendant, being free from the partnership with the plaintiff, entered in his own name into the firm of *Ashton & Sons*.

By the time the partnership between *Dean & McDowell*, had expired the firm of *Ashton & Sons* had made considerable profits, for which the plaintiff, relying on the 11th clause of their partnership articles, required the defendant to account, which he declined to do. Accordingly, in January of 1875, the plaintiff filed a bill to have it declared that the defendant was bound to account to the firm of D. & McD. for his share of the profits realized by the firm of *Ashton & Sons*, between the date of his becoming a partner in that firm and March 1st, 1873, etc., etc.

The defendant in his answer admitted that the business of *Ashton & Sons* had been carried on for his benefit, but asserted that he had never interfered in its conduct during the partnership of D. & McD., and that what he had done tended in reality to benefit and not to injure the partnership. The plaintiff joined issue, and the action came on for trial before Sir George Jessel, M. R., in November, 1877, who dismissed the bill without costs. In his judgment he says: “In my opinion there is no

equity whatever in this bill \* \* To my mind there is <sup>Judgment.</sup> no question whatever as to the meaning of clause 11 of Robertson, J. the articles. \* \* \* It is the correlative of clause 8. Clause 8 means this, that the partner shall devote himself diligently to the business, and clause 11 means he shall not engage in any other business except on account and for the benefit of the copartnership. *But there is no covenant that if he does he will account for the profits to the partnership, which is what this bill asks for.* It is a simple breach of covenant by engaging in business indirectly. It does not appear to me that he has damaged the partnership at all, but this is not a bill for damages; it is a bill to take an account of the share of the profits made by him in another business in which he engaged by the intermediary of a trustee. He was indirectly engaged because he furnished the capital and took the profits. It is not alleged that he neglected the partnership business or that the partnership sustained any damage whatever."

Then after going on to show how such an article can be enforced by injunction "to restrain the partner from committing the breach, or by dissolution, he says:

"Those are the two remedies. But ever since the Court of Chancery existed no one has ever heard of such a bill as this, frequent as the breach, I am afraid, has been. That is pretty good proof that there is no such equity. But in addition to that I go upon the plain words of the article. It is a mere negative covenant and not an affirmative covenant at all. It does not entitle the plaintiffs as partners in the business of D. & McD. to take the defendant's share of the other partnership business, or to interfere in it in any way, as far as I understand the covenant. Therefore, there being no superadded equity, it seems to me that the bill wholly fails and ought to be dismissed." But because there had been a breach, the bill was dismissed without costs.

From this decision the plaintiff appealed, and the appeal came on before James, Cotton and Thesiger, Lords Justices, who unanimously affirmed the decision, and approved of the language used by the Master of the Rolls.



Judgment. In my judgment the remarks of the Master of the Rolls are particularly applicable to the facts in this case—notwithstanding Mr. Armour's statement on the argument that the case is not in point. I think it exactly in point, and that being the case, I am bound to follow it, and therefore I cannot hold that the defendant is entitled to judgment for half of the estimated profits of the orders taken by the plaintiff and his travellers.

The conclusion I have come to on the whole is that, out of the money in court belonging to the partnership, and to which each partner is entitled in moieties, the costs must be paid. Should there not be sufficient to meet them, they must be made up by each party contributing an equal share.

By consent since the argument, the amount found by the Referee to be due to the defendant has been ordered to be paid out to him.

A. H. F. L.

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## [QUEEN'S BENCH DIVISION.]

## RE CRIBBIN AND THE CITY OF TORONTO.

*Municipal corporations—By-law prohibiting Sunday preaching in parks—Validity of—R. S. O. ch. 184, sec. 504, sub-sec. 10—Violation of constitutional right—Unreasonableness—Uncertainty—“Sabbath-day.”*

It is provided by R. S. O. ch. 184, sec. 504, sub-sec. 10, that the council of every city and town may pass by-laws for the management of the farm, park, garden, etc.:—

*Held*, that the municipal council of a city had power under this enactment to pass a by-law providing that no person shall on the Sabbath-day in any public park, square, garden, etc., in the city, publicly preach, lecture, or declaim:—

*Held*, also, that the by-law violated no constitutional right, and was not unreasonable.

*Bailey v. Williamson*, L. R. 8 Q. B. 118, followed:—

*Held*, also, that the by-law was not bad for uncertainty as to the day of the week intended, by reason of the term “Sabbath-day.”

AN application by one Frederick C. Cribbin, a ratepayer Statement. of the city of Toronto, to quash by-law No. 2917 of the municipal council of the city of Toronto, passed on the 20th July, 1891.

This by-law was entitled “A by-law to amend by-law No. 2460, respecting the management of parks,” and provided as follows:—

“Whereas there has arisen a practice for orators and disputants of various religious and other beliefs to publicly preach and declaim in the parks, gardens, and places for exhibition, against the religious and other beliefs and tenets of other persons, in language calculated to provoke ill-feeling between citizens resorting to such places, and breaches of the law therein:—

And whereas such declamations and oratory and loud talking has (*sic*) become a nuisance and interferes (*sic*) with the proper enjoyment of the said parks, gardens, or places for exhibition as places for rest and recreation, and it is desirable to prevent such nuisance:—

Therefore the municipal council of the corporation of the city of Toronto, in pursuance of its statutory powers to manage such parks and other places, enacts as follows:—

1. By-law No. 2460 is amended by adding thereto the following sub-section:

(3a) No person shall on the Sabbath-day, in any public park, square, garden, or place for exhibition in the city of Toronto, publicly preach, lecture, or declaim.

2. Any person convicted of a breach of any of the provisions of this by-law shall forfeit and pay, at the discretion of the convicting magistrate,

## Statement.

a penalty not exceeding the sum of \$50 for each offence, exclusive of costs ; and, in default of payment of the said penalty and costs forthwith, the said penalty and costs, or costs only, may be levied by distress and sale of the goods and chattels of the offender ; and, in case of there being no distress found out of which such penalty can be levied, the convicting magistrate may commit the offender to the common gaol of the city of Toronto, with or without hard labour, for any period not exceeding six calendar months, unless the said penalty and costs be sooner paid."

The following were the applicant's objections to the by-law :—

1. It is not limited to the places specified in sec. 504, sub-sec. 8, of the Municipal Act, R. S. O. ch. 184.

2. It points out a place of imprisonment not mentioned in the statute.

3. It is uncertain as to the day of the week on which it may be enforced.

4. It is not in express terms authorized.

5. It is not within sec. 283\* of R. S. O. ch. 184, because :—

(a) It contravenes general legislative policy ; (b) It violates constitutional right ; (c) Order and public morals are provided for specially in the statute ; (d) It is unreasonable.

The application was argued before GALT, C. J., in Court on the 9th September, 1891.

*G. B. Gordon*, for the applicant. 1. The only clauses of the Municipal Act which authorize the council to manage public parks, etc., are sub-secs. 8 and 10 of sec. 504, for acquiring (sub-sec. 8) any estate in landed property for a public park, and (sub-sec. 10) "for the management of the farm, park, garden, walk, or place for exhibitions and buildings." The by-law extends to places not mentioned in sub-sec. 10, viz., squares. If the by-law is bad in part, it is bad altogether : *Dillon on Municipal*

\* 283. Every council may make regulations not specifically provided for by this Act, and not contrary to law, for governing the proceedings of the council, the conduct of its members, the appointing or calling of special meetings of the council, and generally such other regulations as the good of the inhabitants of the municipality requires, and may repeal, alter, and amend its by-laws, save as by this Act restricted.

Corporations, sec. 421. 2. The by-law in sec. 2 points out the "common gaol of the city of Toronto" as the place of imprisonment. This is contrary to sec. 479, sub-sec. 19, of R. S. O. ch. 184, which gives councils power to pass by-laws for inflicting punishment by imprisonment "in the county gaol." 3. The by-law is uncertain as to the day of the week on which it prohibits preaching, etc. It uses the term "Sabbath-day," which may mean Saturday, or perhaps Sunday. 4. The by-law is not authorized by sub-secs. 34, 38, 46 of section 489 of R. S. O. ch. 184, as to public morals and nuisances. R. S. O. ch. 190 empowers cities and towns to appoint a board to manage parks, etc., but the city of Toronto has not adopted the provisions of this Act. The most the council can do is to regulate the use of parks; they cannot prohibit their use: *McKnight v. Toronto*, 3 O. R. 284. 5. If the by-law were within the express terms of the statute it would be sufficient, but it is not; and it is not within the general welfare clause, section 283, but within the exception in that clause as being "contrary to law," because: (a) It interferes with the legislative policy of the province. R. S. O. ch. 203, "The Lord's Day Act," does not prohibit meetings on Sunday except those of a political character. I refer to Dillon on Corporations, secs. 319, note, 329, 368. (b) Because it violates the constitutional right of the people to hold open-air meetings and have public speaking. I refer to Wise on Riots, ed. of 1889, pp. 9, 10, 12, 15; *Ex p. Lewis*, 21 Q. B. D. 191; *Bailey v. Williamson*, L. R. 8 Q. B. at p. 124; *Anderson v. Wellington*, 19 Pac. R. 719; *St. Louis v. Fitz*, 53 Mo. 582, 585; *Long v. Taxing District of Shelby County*, 7 Lea (Ten.) 134; *Milliken v. Weatherford*, 54 Texas 388. (c) Because the subject of order and public morals is dealt with specially in the Municipal Act: sec. 489, sub-secs. 34, 38, 46; sec. 426, sub-sec. 2. I refer to *State v. Hammond*, 41 N. W. Rep. 243; Dillon on Corporations, secs. 89, 91, 316, 317, 319, 364. (d) Because it is unreasonable; it interferes with the right of speech, not with the right of meeting. I refer to *People v. Armstrong*,



Argument. 16 Am. St. Rep. at p. 581 ; *Des Plaines v. Poyer*, 14 N. E. Rep. 677 ; *Re Frazee*, 63 Mich. 396 ; *People v. Rochester*, 51 N. Y. Sup. Ct. (44 Hun) 166 ; *Trotter v. City of Chicago*, 33 Ill. (App. Ct.) 206.

*H. M. Mowat*, for the city of Toronto. I rely on sec. 504, sub-sec. 10, of R. S. O. ch. 184, as the city's authority to pass the by-law. The word "management" therein used has a very wide meaning, and gives the very widest powers. It means conduct, government, control, administration. See Latham's, Abbott's, Imperial, Anderson's, and English and American Law Dictionaries. See also *Gibson v. Barton*, L. R. 10 Q. B. 329. Sec. 479, sub-secs. 17-19, give power to enforce by-laws by prescribing penalties. As to common gaol, see 24 Vic. ch. 53. It is discretionary with the Court to quash or not to quash the by-law : *Re Smith and Toronto*, 10 C. P. 225 ; *Re Michie and Toronto*, 11 C. P. 379.

*Gordon*, in reply. The word "management" cannot be read so as to include this by-law. It is evidently intended to apply to the physical management of the ground constituting the park.

September 17, 1891. GALT, C. J.—

This is an application to quash a by-law of the respondents which enacts: "By-law No. 2460 is amended by adding thereto the following sub-section: No person shall on the Sabbath-day, in any public park, square, garden, or place for exhibition in the city of Toronto, publicly preach, lecture, or declaim."

This matter was very fully argued by Mr. Gordon for the applicant and Mr. Mowat for the respondents. There were several what may be termed technical objections taken, to which it is unnecessary to refer. But the real contention was that it was not in express terms authorized; it violates constitutional rights, and it is unreasonable.

The by-law was passed under the provisions of R. S. O. ch. 184, sec. 504, which enacts: "The council of every city and town may pass by-laws: (sub-sec. 10)—For the

management of the farm, park, garden, walk, or place for exhibitions and buildings.”

Judgment,  
Galt, C.J.

It was contended by Mr. Gordon that this has reference to what may be termed “the ground,” not the conduct of persons who may be in the parks or gardens. This, in my opinion, cannot be assented to. The whole of by-law 2460, of which the present by-law 2917 is an amendment, with the exception of sections 1 and 2, which deal with the appointment of a superintendent of public parks and his duties, has reference to the conduct of the persons within the park, and the present by-law is simply an addition thereto. No question was ever raised as to the legality of by-law 2460.

The objections as to its being unconstitutional and unreasonable were very strongly urged by the learned counsel for the applicant, his contention being that all persons have the right to hold meetings and make speeches in public parks, and that the council have no power to interfere with such right.

I cannot assent to this view. The learned Judges in the case of *Bailey v. Williamson*, L. R. 8 Q. B. 118, deal with this question very fully. This was a case arising out of a breach by the appellant of the regulations made by the commissioners of Her Majesty's works and public buildings under the provisions of an Act for the regulation of the royal parks and gardens, passed on the 27th of June, 1872. The breach complained of was a violation of the rule that “No public address may be delivered except within forty yards of the notice-board on which this rule is inscribed.” The case was very fully discussed as respects the right of all persons to deliver addresses and make speeches in the parks. Cockburn, C.J., in his judgment says (p. 124): “I think it is quite clear that the regulation as to rules being made by one or other of those authorities, for the purpose of imposing conditions on the delivery of addresses in the park, was clearly within the jurisdiction of the ranger or the commissioners, as the case might be; and that being so, we have no authority here to look into the rules to see whether they are reasonable

Judgment.  
Galt, C.J.

and proper or not." In the introductory part of his judgment he states the reason why the Act of Parliament was passed as follows (p. 122): "The habit of using the metropolitan parks for other purposes than those of recreation and exercise is of modern growth, and it had produced certain inconveniences which required to be modified, and the use of the parks for such purposes required to be regulated by statutory enactments." Blackburn, J., at p. 129, states "As to the other objection, under sec. 11: that section no doubt says that 'nothing in this Act shall authorize any interference with any rights of way, or any right whatever to which any person or persons may be by law entitled.' The appellant's counsel seemed to be under the idea which has been put forward lately, that persons were by law entitled to do what they liked in the parks, to make speeches or anything of the kind. I am aware of no legal principle and no authority, and I am quite confident that there is no enactment which says anything of the sort. I am quite sure that persons are not entitled by law to make addresses in the parks, and consequently the passing of this Act which says that they shall not make an address, by no means interferes with any right to which by law they were entitled."

It appears to me that in accordance with this judgment the corporation of the city of Toronto had the power and authority to pass the by-law, and that it violates no constitutional right and cannot be said to be unreasonable.

Mr. Gordon contended that the by-law was not valid because it is not certain as to the day of the week on which it should be enforced. The term used in the by-law is "Sabbath-day" in place of "Sunday." In the Imperial Dictionary "Sabbath" is defined as "not strictly synonymous with Sunday. Sunday is the mere name of the day; Sabbath is the name of the institution. Sunday is the Sabbath of the Christians." That being so, it appears to me that there can be no question as to the day of the week which is meant by the terms of the by-law, at any rate in the mind of a Christian.

*Application dismissed with costs.*

## [CHANCERY DIVISION.]

## VERNON V. THE CORPORATION OF SMITH'S FALLS.

*Municipal corporations—Chief constable—Tenure of office during pleasure—  
R. S. O. 1887, ch. 184, secs. 279, 445.*

Under R. S. O. 1887, ch. 184, sec. 445, the chief constable for the municipality can only hold office during the pleasure of the council, and this although he may have been appointed for one year by a by-law passed by the council.

THIS was an action brought by Alexander A. Vernon *Statement.* against the Corporation of the town of Smith's Falls, claiming damages for alleged wrongful dismissal from his employment as chief constable of the municipality.

The circumstances of the case, so far as is necessary to this report, are set out in the judgment of MEREDITH, J.

The action was tried on April 14th, 1891, at the Perth Assizes, before MACMAHON, J., and a jury.

The learned Judge held that under the by-law appointing the plaintiff, the council had no right to dismiss him within a year from his appointment without reasonable cause, and left to the jury the question whether "the plaintiff had been guilty of any neglect or misconduct in the discharge of his duties as chief of police for which the council were justified in dismissing him," which they answered in the negative, and assessed the damages at \$319.40.

The defendants now moved by way of appeal before the Divisional Court, and the motion came up for argument on June 5th, 1891, before FERGUSON and MEREDITH, JJ.

*Britton, Q. C.*, for the defendants. I refer to section 441 and section 445 of the Municipal Act, R. S. O. (1887), ch. 184. There is I think a distinction between a by-law under seal, which speaks merely as to what the corporation intend to do, and a contract. The seal attached to the by-law has no significance, for the by-law must be under seal: *Pim v. Municipal Council of Ontario*, 9 C. P.



Argument.

304; *Hickey v. Corporation of County of Renfrew*, 20 C. P. 429; which is followed by *Willson v. York*, 46 U. C. R. 289, 299. We say that under the statute the council has the right to dismiss the plaintiff: *Commonwealth v. Bacon*, 6 Serg. & Rawle, 322; *Barker v. City of Pittsburgh*, 4 Barr. (Penn.) 49.

*Watson*, Q. C., for the plaintiff. I submit nothing in writing was necessary, as what was to be done was to be done within the year: *Dillon on Municipal Corporations*, 4th ed., vol. I., pp. 521-2, sec. 449; and *Argus Company v. Mayor, etc., of City of Albany*, 55 N. Y. 495. As to the right to dismiss, we submit that no such right existed: *Broughton v. The Corporation of Brantford*, 19 C. P. 434. [FERGUSON, J.—But if the statute enacts that municipal officers shall hold office only during pleasure, can the corporation tie its hands by appointing for a fixed period?] I submit so. The effect of the *Broughton Case* is, that the council had no right to dismiss without incurring the usual liability. This is followed by the cases of *Hickey v. Corporation of County of Renfrew*, 20 C. P. 429, and *Willson v. York*, 46 U. C. R. 289. [FERGUSON, J.—In each case the man in question was a clerk, is not his status different from the plaintiff here?] I submit not. The judgments are not rested on any such distinction between a clerk and other officers. In *Harrison's Municipal Manual*, 5th ed., at p. 205, it is said that the right to dismiss during pleasure is subject to there being a hiring for a fixed period, and they can exercise their pleasure by appointing for a fixed period.

*Britton*, in reply. In the *Broughton Case* the corporation was a purely trading corporation. Under section 279, in *Harrison's Municipal Manual*, 5th ed., the author speaks of the dependence of every officer on the pleasure of the present and every future council. See also *Dillon's Municipal Corporations*, 4th ed., sec. 457.

September 5th, 1891. MEREDITH, J.:—

Judgment.

Meredith, J.

The action is for damages for wrongful dismissal from employment.

The plaintiff was appointed by the defendants' council chief constable for the municipality, under section 445 of the Municipal Act, which section provides that such a council shall make such an appointment, and that the person so appointed "shall hold office during the pleasure of the council."

There was no agreement between the parties under the seal of the corporation. The council advertised for applicants for the office; and the plaintiff applied for it. There was some correspondence as to the duties and remuneration, qualifications and requirements; and the council and the plaintiff having agreed upon or being satisfied as to, all such matters, the appointment was made, by by-law, and the plaintiff entered upon his duties under such appointment.

It was contended that the by-law provided for duties other than those pertaining to the office of chief constable, and as to them there might be a hiring not governed by section 445.

But it is plain that the intention of the council was to make such duties part of the duties of the office of chief constable, as they were empowered by sec. 279 of the Act R. S. O., 1887, ch. 184, to do; and that the plaintiff so undertook and performed such duties.

And before the appointment—in the letter of the 19th April, 1890, exhibit B. and memo. attached—these duties were pointed out to the plaintiff as pertaining to the office.

It would therefore seem clear that the defendants had the power to terminate the plaintiff's tenure of the office at any time; and that the council had no power in making the appointment to curtail such power. The council are not the corporation; they cannot exceed the powers conferred upon them in such a case so as to bind the corporation. Their power was to appoint during pleasure only, and to

Judgment. settle the remuneration and provide for the payment of it.  
Meredith, J. Sec. 278.

In view of the powers and duties of the council the by-law, in my opinion, should be read as making the appointment for one year, provided there should be no exercise of the council's pleasure otherwise in the meantime; and fixing the remuneration at the rate of \$500 per annum.

The effect of section 279 of the Act, seems to be very well stated by ARMOUR, J., in *Willson v. York*, 46 U. C. R. at p. 299, in these words :

"The effect of this is, that all such officers hold their offices during the pleasure of the council, and may be removed by the council at any time without any notice of such intended removal, and without any cause being shewn for such removal, and without the council thereby incurring any liability to such officers for such removal.

"There is no hardship in this, for such officers accept their offices upon these terms; and were it otherwise, councils might be greatly embarrassed in the transaction of their public duties by the forwardness of an officer whom they would have no means of immediately removing without subjecting themselves to the liability of an action."

The words of the section in question are plainer if not stronger in the defendants' favour, than those of that section (279); and the latter of the quoted paragraphs is peculiarly applicable to such an appointment as that in question in this action.

I am quite unable to perceive the force of the contention that the council exercised their pleasure under the section in question when making the appointment for one year. If that were so, what need of any provision that the office should be held during pleasure? Neither the council nor the corporation in that case would be in any better position than any one entering into any contract, or making any appointment; the words in question would be futile; and the council would also be exercising not only their own pleasure but that of a future council, the discretion of the then members for that of the future members of the same

and of another council, and destroying the very object of Judgment.  
the provision. And if an appointment could so be made Meredith, J.  
for one year why not, as was asked during the argument,  
for five or for ten or for any other number of years.

This contention was perhaps too palpably erroneous to call for any observations upon it, but it may be better to show that it has not been overlooked.

As to the defendants' unfettered right, through their council, to exercise their pleasure without assigning any cause, I refer, in addition to the cases mentioned during the argument, to *Hayman v. Governors of Rugby School*, L. R. 18 Eq. 28; the cases collected in Shortt on Mandamus, at pp. 404, 395-6; see also *McIntyre v. Hockin*, 16 A. R. 498, and *Marshall v. McRae*, 17 A. R. 139, reversed in Supreme Court of Canada, 11 C. L. T. 257.

The exercise of the council's pleasure was not expressed to be for any cause; but, as the resolution puts it, "his services are not wanted." And no reasons are given in the notice, to the plaintiff, of his dismissal.

I would therefore allow this motion, and dismiss the action, upon the ground discussed only, but would dismiss it without costs for these reasons: the defendants have failed upon the questions of fact on which they went to trial, and the plaintiff is entitled to have the findings as to them appear upon the record, and to his costs of the action occasioned by them; whilst the defendants are entitled to their costs of the action and of this motion, except in so far as they have been increased by those issues; roughly estimated the costs to which each party is thus entitled from the other are nearly equal; so that the better disposition of the question of costs is that none should be awarded to either party from the other, and further costs are thus saved.

The defendants have not specifically pleaded the defence upon which, in my opinion, they are entitled to succeed; but it was urged, without objection on that ground, at the trial and upon this motion, and if any amendments are by reason thereof necessary, they should be made so that the



Judgment. record, and the formal judgment to be entered up, in the  
Meredith, J. action, may show the issue upon which the defendants  
succeed.

In my opinion the motion upon the other grounds fails; the findings of the jury upon the other questions ought not to be disturbed.

FERGUSON, J :—

I fully agree in the conclusion arrived at by my brother MEREDITH, and as to the reasons assigned for it.

I also agree as to the disposition made in respect to the costs, and the reasons for such disposition.

The finding of the jury seems immaterial to the disposition of the case, though it may be material to the plaintiff in other respects. It may be allowed to stand of record. But the action will be dismissed on the grounds stated in the judgment of my learned brother. As the defendants went to trial upon the issues stated on the record they cannot complain of this course.

The defendants' motion here really succeeds upon the grounds stated in the fourth paragraph of the notice of motion.

A. H. F. L.

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## [CHANCERY DIVISION.]

## TAILLIFER V. TAILLIFER.

*Foreign law—Conflict of laws—Ante-nuptial contract—Present and future property—Matrimonial domicil—Lex rei sitæ—Statute of Frauds—Signature by notary in Quebec.*

The plaintiff's husband entered into an ante-nuptial contract in the Province of Quebec with her concerning their rights and property, present and future. He subsequently moved to this Province and died there intestate :—

*Held*, that this contract must govern all his property movable and immovable, though situate in this Province, provided that the laws of this Province relating to real property had been complied with ; and that it made no difference whether the matrimonial domicil of the parties at the time of the contract and marriage was in Ontario or Quebec.

The ante-nuptial contract in question was not signed by the parties but by the notaries in their own names, they having full authority from the parties to do so :—

*Held*, that this was a sufficient signature within the Statute of Frauds to bind the parties.

THIS was an action for the administration of the estate *Statement.* of the late Alexis Taillifer, and for a partition of the real estate ; all the facts of which necessary to this report are set out in the judgment of FERGUSON, J.

The action came on for trial before FALCONBRIDGE, J., at the Autumn Ottawa Assizes, 1890, who, on hearing the evidence adduced, gave judgment as follows :

*Belcourt* and *G. F. Henderson*, for the plaintiff.

*Snow*, for the defendant Alexis.

*A. F. McIntyre*, Q. C., for the infant defendants.

February 6th, 1881. FALCONBRIDGE, J. :—

The plaintiff Marie and her husband decided before their marriage to come as soon as they could to live in Ontario, and they did come on the 10th of May of the year following their marriage. She says they had not saved enough before that to enable them to come and take up new land.

Judgment. The matrimonial domicile is therefore the domicile of the husband, it having been the intention of the parties to fix their residence there, *i. e.*, in the province of Ontario : Wharton's Conflict of Laws, 2nd ed., sec. 190. The rights of the parties *quoad* the real and immovable property (at any rate as to which there is no special nuptial contract) must be adjudged by the *lex rei sitæ* : *ib.*, sec. 191-2.

Falconbridge,  
J.

The marriage contract or settlement must be, so far as the realty is concerned, dealt with as to its construction and validity with reference to the law of matrimonial domicile, according to the English decisions : *ib.*, sec. 199, although there are the high opinions of Chancellor Kent and Judge Story that the rights are governed by the *lex loci contractus*.

And it would seem that if the question of the validity of the contract has to be decided exclusively by the law of England, as all real contracts must be governed by the *lex rei sitæ*, the contract cannot be enforced either as a contract or as a declaration of trust for want of compliance with the Statute of Frauds : Story on Conflict of Laws, 8th ed., secs. 363, 364.

As to the movables the rule is different, and the *lex loci contractus* will govern.

The lease which plaintiff Marie assumed without authority to make to Alexis will be avoided, and the registration thereof vacated.

Costs to all parties out of the estate.

The plaintiff now moved before the Divisional Court by way of appeal from this decision so far as the same held the marriage contract void as to the realty, and the motion came on for argument on June 10th and 12th, 1891, before FERGUSON, and ROBERTSON, JJ.

*Shepley*, Q. C., for the plaintiff. The matrimonial domicile here was in the Province of Quebec, not of Ontario, as the learned Judge has held. He was also wrong in treating this matter as dependent on the matrimonial domicile. Thirdly the parties here have elected to put their property

wherever situate within the operations of the civil code, as *Argument*. they had a perfect right to do, by this contract. They have shewn their intention to have their rights determined by the law of Quebec. They made the property "community property." We ask a declaration that the contract is valid, and enforceable here as to the immovable property. We say, also, that the contract did comply with the Statute of Frauds, and operates as a contract, even if not as a conveyance. It is signed by the notary for both parties, just as an auctioneer signs. I refer to Story on the Conflict of Laws, 8th ed., p. 240, on the point that this is not a question of matrimonial domicil. The nuptial contract wipes away all question of matrimonial domicil. Also see Wharton on the Conflict of Laws, 2nd ed., sec. 199; Dicey's Law of Domicil, p. 150-1. There is nothing to shew an election of Ontario as a domicil. Besides the contract precludes any such idea. By necessary implication they have applied to this contract the law of the Province of Quebec. There was no doubt a vague intention when they had enough money to come and live in Ontario; but the evidence of intention is overwhelmingly strong that they elected Quebec law to govern the provisions of this contract. It was competent for the parties no matter where domiciled, and no matter where the property was situated to enter into a contract declaring their intention that the property in question was to be governed by any foreign law, and in such case the Court will give effect to their contract in accordance with such foreign law: *Este v. Smyth*, 18 Beav. 112; *Anstruther v. Adair*, 2 M. & K. 513. If the Statute of Frauds is to be applied to this case it appears by the notarial document that the parties declared their inability to sign the same, and authorized the notaries so to do, and the notaries have signed. No distinction can be found between this case and that of an auctioneer. The contract has been moreover executed and acted on by the parties: Fry on Specific Performance, 2nd ed., pp. 247-9. As to the subsequently acquired property there is what amounts to a good declaration of trust.



**Argument.**

*Snow*, for the defendant Alexis Taillifer. The domicile is in Ontario; the place of performance of the contract is here. There is uncertainty on the face of the contract as to the location of the property. The property is not described with reasonable certainty. I will assume for the purpose of my argument that it is in Ontario. [*Shepley*. It is such a description as may be made clear by parol evidence.] As to domicile, under Art. 63 of the Civil Code of Lower Canada, a man must reside six months prior to the marriage to acquire domicile: also I refer to Story on the Conflict of Laws, 6th ed. (1865) secs. 46, 198, 278; *Turner v. Thompson*, 13 P. D. at p. 41; Westlake's Private International Law, 3rd ed., secs. 36, 38-9, 156, 167-9; *Don v. Lippmann*, 5 Cl. & F. 1; *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *Chamberlain v. Napier*, 15 Ch. D. 614; *Brodie v. Parry*, 2 V. & B. p. 131. On the question of the Statute of Frauds I refer to Story on the Conflict of Laws, 6th ed. sec. 262, and sec. 363. All real contracts must conform to the laws of the country where the land lies: *ib.*, sec. 373. See also R. S. O., 1887, ch. 61, sec. 29; *Loffus v. Maw*, 3 Giff. 592; S. C. 8 Jur. N. S. 607; *Alderson v. Maddison*, 7 Q. B. D. 174, 8 App. Cas. 467.

*Aytoun-Finlay*, for the infant defendants. There is no contract under the Statute of Frauds. R. S. O., 1887, ch. 61, sec. 29, has not been complied with, and it must be strictly applied. The instrument is not a certified copy, but a copy of a notarial instrument, and there is no seal. There is nothing to shew that the instrument has ever been enrolled, filed or enregistered. All the conditions of section 29 are conditions precedent before a copy can be used, and a copy cannot be brought in even by consent. The statute must be complied with and cannot be waived: *Gray v. McMillan*, 5 C. P. 400. Admitting that it does shew a contract the agency of the notary is not proved: Fry on Specific Performance, 2nd ed. p. 234. I admit that the matrimonial domicile was not in Ontario and also that as regards the construction of the document it must be construed by laws of Quebec, the *lex actus*.

But this document purports to affect land in Ontario, and Argument.  
the laws of Ontario as to the transfer of land are repugnant to the terms of the contract. This contract is really an attempted conveyance executed in itself as soon as marriage takes place. It is not a contract for future conveyance, but a contract which does convey. By 14 & 15 Vict. ch. 7, sec. 4 (C. S. U. C. ch. 90), the Act in force when the contract was made; it is enacted that an assignment required to be in writing must be by deed. This man died intestate, and here our law steps in and says that the estate must be divided in a certain way. This contract cannot counteract the provisions of R. S. O., 1887, ch. 108, especially as it was never registered: Westlake on Private International Law, 3rd ed., p. 71. As to the suggested trust, there is no declaration of trust here. Vaizey on Settlements of Property, pp. 1641-2, *Adams v. Clutterbuck*, 10 Q. B. D. 403, *Martin v. Martin*, 2 Russ. & M. 507; *Waterhous v. Stansfield*, 10 Ha. 254, shew how the *lex situs* is applied. Enforcement is an implied term of this contract, and to have enforcement the aid of the Ontario Courts must be sought, and this is not such a case as that the Courts will enforce the contract. *Langtry v. Dumoulin*, 7 O. R. at p. 517-8, may be cited on the point of evidence as to the notarial document. As regards the power of an auctioneer to bind both parties, it must be remembered the auctioneer does not sign his own name. I cite also *Alderson v. Maddison*, 7 Q. B. D. 174; Brooke's Office of a Notary, 5th ed., p. 46-7.

*Shepley*, in reply. The objection to the form of evidence was not raised at the trial, and should not be entertained now. *Gray v. McMillan*, 5 C. P. 400, is really an authority in our favour. See, also, *Earl of Glengal v. Barnard*, 1 Keen 769. As to our not being able to enforce this as a conveyance because not under seal, nor as a contract because it is intended as a conveyance: Westlake's Private International Law, secs. 38, 39, is opposed to such a contention. The cases cited are distinguishable.

Judgment. September 5, 1891. FERGUSON, J. :—  
Ferguson, J.

The action is for the administration of the estate of the late Alexis Taillifer, who died on or about the 10th day of May, 1879, and for the partition of the real estate. The plaintiffs are his widow, his daughter, Marie Guindon, and the husband of this daughter.

The defendants are an adult son Alexis Taillifer and several infant children. The intestate, the late Alexis Taillifer, at the time of his death resided on a farm in the township of Gloucester, in the county of Carleton, in Ontario.

On the 6th of February, 1890, letters of administration issued out of the Surrogate Court of the county of Carleton, whereby the widow Marie Taillifer was appointed administratrix.

The parties cannot agree as to the manner in which the property of the intestate should be distributed, or as to what are their respective rights in the same, owing chiefly, as it appears to me, to differences of opinion as to the legal effect in this country, and as to property situated in this country, of a marriage contract between the intestate and the plaintiff Marie Taillifer, then his intended wife, entered into and executed in the province of Quebec on the 31st day of March, 1864, immediately prior to their marriage there.

The action was tried before my brother Falconbridge at the last Ottawa Assizes, and as it appears the chief if not the sole question was whether or not the rights were and the distribution and partition should be in accordance with the provisions of this marriage contract, which so far as I can see, seems to be an express contract respecting the rights and property of the parties to it, then present and future.

The learned Judge apparently relying in a large measure upon the law as stated in Wharton's Conflict of Laws, sections 190, 191, 192, and 199, decided that as to the movable property the provisions of the marriage contract should

govern ; but that as to immovable property (the lands) this contract could not be enforced either as a contract or as a declaration of trust for want of compliance with the requirements of the Statute of Frauds, the learned Judge referring to Story's Conflict of Laws, sections 363 and 364. Judgment.  
Ferguson, J.

All parties seem satisfied with this decision as to the movable property. The plaintiffs who appeal are dissatisfied with the decision so far as it has regard to the lands, contending, as they do, that as to these (the lands) the marriage contract should govern also. As stated by counsel the only matter to be determined here is as to whether or not the provisions of this marriage contract should be given effect to in respect to these lands in this administration and partition. The appellants contend that in this respect the decision of the learned Judge is erroneous and should be reversed. Their contention is that as to all the property, both real and personal (movable and immovable), the provisions of the contract should be given effect to in these proceedings for administration and partition. The respondents seek to support the judgment as it is. Counsel for the infants, however, raised a question which was not raised at the trial, which was that the contract was not proved because there was not a copy sufficiently or properly certified of the notarial deed containing the contract. This was, however, as I thought, disposed of at the argument, and I do not desire to say anything further as to it beyond expressing my opinion that the evidence was, in the circumstances, sufficient.

The marriage contract was entered into before two notaries for Lower Canada, residing in the district of Montreal, at St. Martin. The evidence respecting the law of that country shows that it is a good and valid contract according to such laws. Amongst other things it makes full provisions in respect to the property of both parties. It was entered into in the presence of the fathers of the respective parties to it. It describes property of the then future husband as consisting of a farm situate in the parish of St. Joseph, in the district of Ottawa, in the third conces-



Judgment. sion, being lot number seven of three acres in width, by  
Ferguson, J. twenty-five acres in depth—giving boundaries—with a dwelling-house and barn thereon, and provides that the then future husband has changed this to movable property so that the same may be considered as an asset of the “community.” The contract provides also that the then future spouses should be common in all property, movables and acquired immovables (acquêts in community) during the then future marriage.

It appears from the evidence of the widow that the lands mentioned in the contract of marriage were the west-half of lot number seven in the third concession of Gloucester; that during the marriage the intestate acquired the other half of the same lot; the parcels, she says, were and are seventy acres and fifty acres, making one hundred and twenty acres, and that these are the lands that he had and on which he resided at the time of his death. It also appears that the intestate and his wife and their children had for a long series of years resided on this property, as I gather, in the usual way.

The learned Judge in his judgment seems to have laid much stress on the matrimonial domicile of the parties at the time of the contract and marriage, holding that such domicile was in Ontario and not in Quebec, a matter that I do not in the circumstances think of any consequence, for I think the authorities show that persons, no matter where their domicile may be, are competent to make a contract, which if well made according to the law of the country in which it is made, will govern and control their property or properties wherever situated, provided that in the case of real property the requirements of the laws of the country in which the real property is situate are complied with, the contract, of course, not being repugnant to the laws of the country where the lands are.

In Story's Conflict of Laws, 8th ed., sec. 140, it is said: “The principal difficulty is not so much to ascertain what rule ought to govern in cases of an express nuptial contract, at least, where there is no change of domicile, as

which rule ought to govern in cases where there is no such <sup>Judgment.</sup> contract, or no contract which provides for the emergency. <sup>Ferguson, J.</sup> Where there is an express nuptial contract that, if it speaks fully to the very point, will generally be admitted to govern all the property of the parties not only in the matrimonial domicile, but in every other place, under the same limitations and restrictions as apply to other cases of contract. But where there is no express nuptial contract at all or none speaking to the very point, the question which rule ought to govern is surrounded with more difficulty. Is the law of the matrimonial domicile to govern? or is the law of the local situation of the property? or is the law of the actual or new domicile of the parties? Does the same rule apply to movable as to immovable property when it is situated in different countries?"

The learned author then, after referring to many authors and authorities, gives a summary commencing at section 184, in which he says:

"Where there is a marriage between parties in a foreign country, and an express contract respecting their rights and property, present and future, that, as a matter of contract, will be held equally valid everywhere, unless under the circumstances it stands prohibited by the laws of the country where it is sought to be enforced. It will act directly on movable property everywhere. But as to immovable in a foreign territory, it will at most confer only a right of action to be enforced according to the jurisprudence *rei sitæ*. Where such an express contract applies in terms or intent only to present property, and there is a change of domicile, the law of the actual domicile will govern the rights of the parties as to all future acquisitions."

The learned author then deals with cases in which there is no express contract, and shows how very different is the situation, but as that is not the present case I need not say more of it here.

Although the case *Este v. Smith*, 18 Beav. 112, was not, as a case, like the present one, it contains much that is, I think, in the same view as that expressed in the pas-

Judgment. sages in Story's Conflict of Laws to which I have referred  
Ferguson, J. as applicable to the present case, and that, I think, in support of the view that I have taken of this branch of the case : see particularly the language of the Master of the Rolls, Sir John Romilly, at p. 122. So far as I am able to perceive the sections in Wharton's Conflict of Laws, referred to by the learned Judge, and the cases referred to in them, do not really conflict with the views stated above. I think *Anstruther v. Adair*, 2 M. & R. 513, is largely in support of it, and after having perused with some care, I think, the many authorities referred to on the argument, I can adopt no other view than the one I have stated.

It is to be borne in mind that in this case there is an express contract speaking fully to the very point and matters in dispute embracing both then present and future property.

This contract is not I think repugnant to our laws. If in this country a deed of trust were executed settling property after the manner of "community property" in the other province it would not I think for this reason be objectionable, and our Courts could not refuse to give effect to it.

Then the lands are in this country, and it is said that there is no sufficient note or memorandum to satisfy the requirements of the fourth section of the Statute of Frauds. Apart from any question there may be as to whether this document contains a sufficient description of the lands, of which I will speak hereafter, there is a paper containing the contract, it is signed by notaries, and at present saying nothing of the evidence as to the parties "touching the pen" when the signatures of the notaries were being written, I am of the opinion that the signing by the notaries or one of them is sufficient. It is said on the face of the document and in the evidence of the widow that neither of the parties could write, and it was suggested that this was in fact the reason for the presence of and the signing by the second notary.

There can I think be no doubt that the notary was a

Judgment.  
Ferguson, J.

person lawfully authorized to sign this paper. It is the signing on behalf of the intestate that is here important. He went with his then intended wife to the notary for the avowed purpose of having this paper drawn up and properly signed. The notary signed his own name, having full authority from both the contracting parties so to do. The signature required by the statute is that of the party to be charged or his agent: Benjamin on Sales, 4th Amer. ed., 1888, sec. 272; Reed on the Statute of Frauds, sec. 730; Brown on the Statute of Frauds, 4th ed. 364.

In the case *Goom v. Aflalo*, 6 B. & C. 117, the signature was the broker's own signature. True a broker is somewhat differently situated from the ordinary person, not being supposed to be a principal himself. But the Court placed the decision clearly upon the Statute of Frauds, holding the signature to be good. And there was some other cases to the same effect. So far as I have been able to see the signing of this paper would be sufficient if nothing more were said. The uncontradicted evidence however is that both the parties touched the pen while this signing was done, which shews that the very act of signing was done with full authority, and the intention of being bound by the signature.

It was urged that this paper is not a note or memorandum, but a "pseudo conveyance," and that as such it is wholly insufficient to pass the estate according to our law. I do not see that this can affect the result. There is a writing duly signed, and it is all that in this respect the statute requires. The note or memorandum may be found in a letter or in almost any other document, and if the contents are sufficient, and it is duly signed, that answers the requirements of the section.

It was contended that there is no sufficient description of the lands contained in this paper. A clause in the document before alluded to describes the land. I think the description the equivalent of "my farm situate in the parish of St. Joseph, in the district of Ottawa, in the third concession, being lot number seven"—giving the frontage



Judgment. and depth—"with a dwelling-house and barn thereon  
Ferguson, J. erected."

In Fry on Specific Performance, 2nd ed., sec. 325, it is said that every contract must contain a description of the subject matter, but it is not necessary it should be so described as to admit of no doubt what it is, for the identity of the actual thing, and the thing described may be shown by extrinsic evidence and instances are there given where this has been done.

It rather seems from the evidence of the widow that the intestate had no farm in that place but this one, and she identifies the property. The evidence was manifestly not given for this purpose, but I think this sufficiently appears from it. The deed itself says this is the property of the intended husband, the meaning being "his only property." I am disposed to think the description in the circumstances sufficient. The document, however, refers to two other papers, conveyances of the same land which were not put in evidence, and if it is still contended that the description is insufficient there should I think on proper terms be an opportunity of producing these conveyances, and making out a description free from all doubt if they will effect that object.

On the whole case I am of the opinion that the appeal must be allowed with costs.

ROBERTSON, J., concurred.

A. H. F. L.

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## [CHANCERY DIVISION.]

## IN THE MATTER OF THE OWEN SOUND DRY DOCK, SHIP-BUILDING, AND NAVIGATION COMPANY (LIMITED).

*Company—Excess of assets over liabilities—Issue of shares at a discount—Winding-up—Contributories—R. S. C. ch. 129.*

A joint stock limited liability company being indebted in a small amount, which was afterwards paid off, and having at the time assets worth more than double the amount of its issued stock and all other liabilities, allotted a number of shares to its shareholders, at a discount. Subsequently the company was freshly incorporated with the shares so issued treated as fully paid up, and afterwards falling into difficulties, was put into liquidation under R. S. C. ch. 129 :—

*Held*, that these shareholders were not liable as contributories.

THIS was an appeal from the Master at Owen Sound. Statement.

The company was in process of winding-up in the Master's office, under R. S. C. ch. 129, and an application was made to him to have certain shareholders put upon the list of contributories.

It appeared from the evidence that the company was originally incorporated under 37 Vic. c. 55, (O.). The capital stock was nominally \$50,000 of which \$15,000 was subscribed for and held by five persons who were the directors of the company. The company had also received a bonus from the town of Owen Sound, upon certain conditions which had been fulfilled. In starting and working the company these directors had, as individuals, performed services and supplied goods to the company, by which certain amounts became due from the company to them. And at a meeting of directors held in January, 1880, they had passed a by-law accepting \$3,000 from each of themselves in full payment of \$3,750 stock.

\*The form of the by-law was "That in view of the several accounts for supplies of the various shareholders in this company on the 31st December, 1879, being as follows :

(Names and amounts were set out).

It be therefore resolved, that the share capital of this company be closed and declared paid up in the following manner, that is to say. That \$3,000.00 of J. H.'s account be the amount constituting him as holder of 37½ shares of paid up stock in the company \* \* "

This was followed by other clauses naming each of the other directors.  
—REP.

**Statement.** That at the time they did this the company was perfectly solvent.\*

In 1884 the company was incorporated by the Dominion Act 47 Vic. c. 99, and the books then showed the stock as paid up.

The material part of the Master's judgment was as follows:

On application of the liquidators to settle the list of contributories, I am asked to put the following persons on the list for the following amounts respectively; (naming them and the amounts).

The list of shareholders and amount of stock allotted to each remained the same until January, 1880. In January, 1880, each of the directors had a claim against the company of more than \$3,000 \* \*

At this time the liabilities of the company outside of their respective shareholders amounted to \$2,200; the assets of the company consisted of the dry dock, the value of which appears to have been at that time about \$30,000, and also other assets consisting of accounts and stock in vessel property, the exact amount of which I have not been able to ascertain, but it probably amounted to \$10,000 at least: so that I find, at that time, the company had over and above their liabilities to all their creditors, and on account of stock subscribed and paid up, assets amounting to at least \$15,000, perhaps more; so that in my judgment, they would have been justified at that time in making a division of a portion of the surplus assets, either by dividing the same or realizing on them and declaring a dividend in cash amounting to \$5,317. No dividend was, however, in terms declared. The directors who constituted the whole of the shareholders had a meeting on 24th January, 1884, and directed that (here the learned Master set out how \$3,000 was accepted in full payment of \$3,750 worth of stock).

It is contended by the liquidators, that this constituted the issuing of shares at less than their nominal value. On the other hand the contributories contend that at this time

\* The finding on this point is set out in the Master's judgment.

there was a surplus over and above the amount represented by the capital stock, which the directors had a right to dispose of in any way they thought proper; that if they chose they might instead of declaring the dividend, and taking surplus assets out of the company have applied it to the payment of the additional stock and distribute it as they did. Statement.

*In re Railway Time Tables Publishing Co., ex p. Sandys*, 42 Ch. D. 98; *In re Almada and Tirito Co.*, 38 Ch. D. 415; and *In re Addleston Linoleum Co.*, 37 Ch. D. 191 appear to settle conclusively that the company has no right to issue shares at a discount. In none of these cases, nor in any other that I have read, has the company had assets to represent the amount of discount off the shares which were issued as being fully paid up, and a distinction must be made between such cases as these, where the subscribed capital stock of the company is not represented by assets in the possession of the company, and a case like the present where the subscribed capital stock is fully represented by assets with a considerable surplus.

The company, I find, were in January, 1880, possessed of a considerable surplus of property, over and above all liabilities, including stock subscribed, and had the right to make some disposition of such surplus. Creditors could not complain and all stockholders concurred. If they had the right of disposing of such surplus assets of the company by declaring a dividend or making a division of a portion of these assets, it seems to me that they would also be justified in investing their surplus in stock and dividing it in any manner they thought proper among the existing shareholders. The creditors' rights certainly would not be interfered with: see *Waterman on Corporations*, vol. 2, pp. 145, 170, 171.

None of the debts of the creditors, now existing, were incurred by the company until long after the division of the assets effected by the by-law. The by-law itself may not have been as explicit and as full as it should have been to explain the intentions of the shareholders and



**Statement.** may be defective in other respects ; objection being taken to it, that it was not ratified at an annual meeting of the stockholders. I think these objections ought not to prevail, as the directors who passed the by-law unanimously concurring in its provisions constituted its whole body of stockholders : *Merchants' Bank of Canada v. Handcock* 6 O. R. 285.

In 1884 the company was incorporated by an Act of Parliament of Canada, chap. 99, whereby all the real and personal estate, shares or stock, debts, assets, and claims of the original company were transferred to and invested in the company now being wound up. At the time of the passing of this Act, the books of the company showed these shareholders each to be the owner of thirty-seven and a-half shares of \$100 fully paid up. The losses which necessitated the winding-up of the company were also incurred long after the passing of the by-law, and in fact after the Act of Incorporation of 1884. So far as I can ascertain from the evidence, there were ample assets possessed by the company to represent the \$15,000 shares then allotted and declared paid up, and no stock was subscribed or allotted subsequent to that time.

Under these circumstances, therefore, as they appear to me upon the evidence, I must find the stock allotted to these shareholders as fully paid up, and that the liquidators are not entitled to place any of them on the list. The application must be dismissed with costs.

From this judgment the liquidators appealed and the appeal was heard on September 17, 1891, before ROBERTSON, J.

*J. M. Kilbourn*, for the appeal. The question of solvency or pecuniary position of the company at the time they accepted \$3,000 in full payment of \$3,750 is of no consequence, because even if they had assets out of which they could have declared a dividend, they should have formally declared one and parted with it from the com-

pany. The net earnings of the corporation remain the property of the corporation as fully as its other property until a dividend is declared: Waterman on Corporations, vol. 2, at p. 170. The earnings are not profits until so declared: Waterman, vol. 2, p. 163, *n.* 2. Here the evidence shews that the directors allowed the earnings to remain in the business as increased capital so they cannot at the same time be deemed to have declared a dividend and paid themselves as profits. A dividend should be declared by by-law or some formal act: Waterman, vol. 2, p. 148. Even if the company had declared a dividend and held it, it could not now be paid over and the shareholders could not set it off as against any amount due for stock: R. S. O. (1877) c. 150, s. 53, sub-s. 2. The by-law does not shew that any part of the assets were set apart for the purpose of a dividend, and the evidence shews that there was no surplus at the time of its passing. The \$15,000 bonus was a public gift for a public purpose, which became capital and the company had no right to divest itself of it: Morawetz on Private Corporations, vol. 2, 2nd ed., par. 1114, 1120, 1126. And the \$30,000 dry dock was itself an asset which could not be divided. I refer also to *Livingstone v. Temperance Colonization Society*, 17 A. R. 379, at p. 396; *New York etc. Railroad v. Nikals*, 119 U. S. R. 296.

*Hoyles, Q. C., and H. B. Smith, contra.* In 1884 the books shewed the shares fully paid up. In 1887, the creditors claims arose and they cannot now go behind the paid up stock. The evidence shews that in 1887, seven years after the date of the by-law, the assets were \$59,000. The company had the right to make a division but they left the stock intact. The only parties who could complain would be the shareholders. No creditors, whose claims arose seven years after, can complain. No by-law was necessary unless the shareholders objected: *Merchants' Bank of Canada v. Handcock*, 6 O. R. 285. The whole company met when the by-law was passed: *Kiely v. Kiely*, 3 A. R. 438, at p. 443. If the stock had been impaired complaint could fairly be made, but no such thing

Argument.

**Argument.** happened here: *Holmes v. Newcastle-upon-Tyne Freehold Abattoir Co.*, 1 Ch. D. at p. 688. The liquidators cannot object as the company could not and they represent the company: *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29; *In re A. W. Hall & Co. Limited*, 37 Ch. D. 712. The company had a perfect right to do as they did when they were in such a sound financial position.

*Kilbourn*, in reply.

September 17, 1891. ROBERTSON, J.:—

I cannot disturb the Master's findings. He has found that at the time the transaction took place the company was not only solvent, but had a surplus sufficient to warrant them in accepting from these shareholders \$3,000 in payment of thirty-seven and a half shares at \$100 each, as they then had sufficient to pay the \$750. They could have sold out the assets and paid each of the shareholders \$3,750 and more; and he points out how this state of things came about. They had a dry dock worth \$30,000 and other assets. This was in 1880.

Then the Dominion Act incorporated them as a company with its stock paid up, and it is not pretended that these creditors were misled in any way by the supposition that there were stockholders who had not paid in full, etc.

I can see no reason on the whole for interfering with the findings of the Master, and I dismiss the appeal. The costs to be paid out of the assets of the company.

G. A. B.

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## [CHANCERY DIVISION.]

## DUNCAN V. CANADIAN PACIFIC RAILWAY.

*Railways—Unfenced line—Horses straying from adjoining property—  
Absence of by-law—Non-liability—53 Vict. c. 28, sec. 2, (D.)*

53 Vict. ch. 28, sec. 2 (D)., amending the Dominion Railway Act of 1888, enacts “ \* \* and no animal allowed by law to run at large, shall be held to be improperly on a place adjoining the railway, merely for the reason that the owner or occupant of such place has not permitted it to be there.”

Horses belonging to the plaintiff, while running at large, strayed from premises adjoining the defendants' line of railway where they had been without permission of the occupant, on to the railway track, which, contrary to the statute, was unfenced, and were run over by a locomotive and killed. No affirmative by-law had been passed by the local municipality permitting horses to run at large :—

*Held*, that the defendants were not liable.

THIS was an action brought by Robert A. Duncan Statement. against the Canadian Pacific Railway Company for damages for the loss of three horses, killed on the line of the defendants.

The action was tried at Port Arthur on July 14th, 1891 before MACMAHON, J.

*Delamere*, Q. C., and *Boyce*, for plaintiff.

*Watson*, Q. C., and *A. MacMurchy*, for defendants.

The facts sufficiently appear in the judgment.

August 15, 1891. MACMAHON, J. :—

Action to recover the value of three horses killed on the defendants' line of railway at Rat Portage, on the night of the 30th of June, 1890, alleged to have been caused by the neglect and omission of the railway company to erect and maintain fences on each side of the railway passing through and over Tunnel Island.

At the trial the fourth paragraph of the statement of claim was admitted to be true, and is as follows :

“ Tunnel Island is an island on the northern border of



Judgment.  
MacMahon,  
J.

the Lake of the Woods, and formed by said lake, and by two branches of the Winnipeg river, and is wholly situate within the corporate limits of the corporation of the municipality of Rat Portage, which said corporation was, prior to the 30th day of June, 1890, has since been and now is, a municipal corporation duly organized under the laws of the Province of Ontario, and a large portion of the said island, was, prior to the said last named date, surveyed and subdivided into lots for settlement."

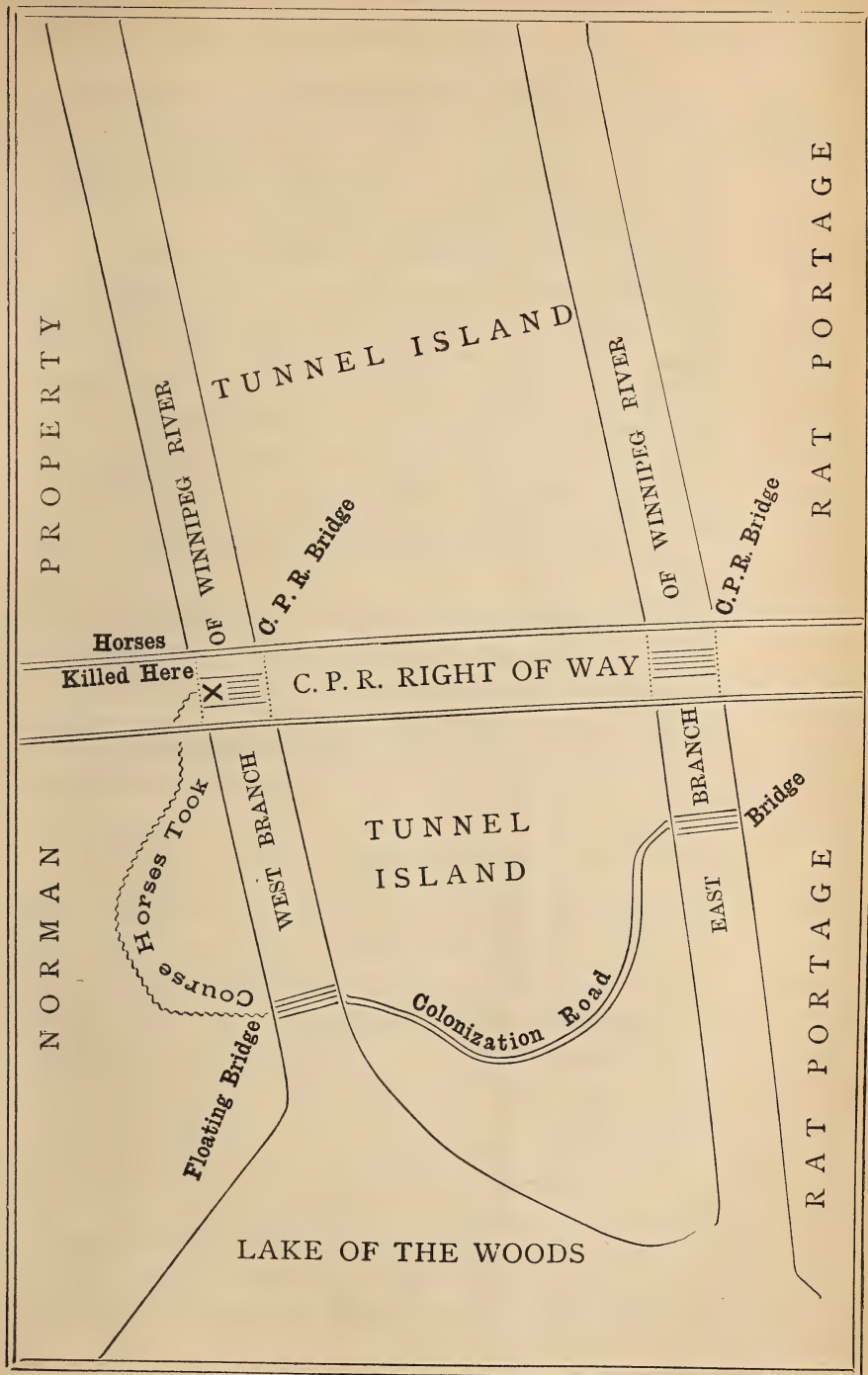
It was also admitted that the railway company acquired the land for the use of the railway passing over Tunnel Island from the Dominion Government; and that at the time the plaintiff's horses were killed, the line of the railway was unfenced.

It was further admitted that the horses were killed by a locomotive on the railway track, where it passes through what is known as the "Norman property," on the west side of the west branch of Winnipeg river, and that their value was \$500.

I find that the plaintiff, about eight o'clock on the night of the 30th of June, took the horses over the floating bridge which crosses the east branch of the Winnipeg river, and left them on Tunnel Island; and that at such time bars were up at the east and west branch bridges connecting the Colonization road crossing Tunnel Island. That the horses crossed from Tunnel Island over such west branch bridge to the Norman property; but whether from the bars at such bridge being of insufficient height to prevent their being easily jumped over, or by reason of their being let down, there is no evidence on which a finding can be made.

I find that the horses got on the railway embankment where the track passes through the "Norman property," and were proceeding eastward on the railway bridge, crossing the west branch of the Winnipeg river, when struck by a locomotive and killed, about four hours after the plaintiff put the horses on Tunnel Island.

The Keewatin Lumber Company claimed to have been in



Judgment.  
MacMahon,  
J. possession of Tunnel Island since 1876, under a lease from the Dominion Government, and in 1889, by a notice put up on the land, notified all persons not to trespass on the Island, which notice was also published in a newspaper in Rat Portage, during May, 1891.

The Keewatin Company could not claim to be in possession under such license from the Dominion Government since the date of the delivery of the judgment of the Privy Council in 1888, in *St. Catharine's Milling & Lumber Co. v. The Queen*, 14 App. Cas. 46, holding that the Province of Ontario was entitled to these lands.

The "Norman property." runs westward as far as the district of Keewatin, but the portion of such property from which the horses reached the embankment of the defendants' railway, is within the municipality of Rat Portage.

The municipal council of Rat Portage on the 25th of June, 1884, passed a by-law prohibiting the running at large of horses and swine, within certain defined boundaries of the municipality.

This by-law was amended and the limits of the prohibition somewhat extended by a by-law passed on the 22nd of August, 1887.

These by-laws have no effect whatever on the question to be decided in this action.

*Jack v. The Ontario, Simcoe and Huron Railroad Union Co.*, 14 U. C. R. 328, and *Crowe v. Steeper et al.* 46 U. C. R. 87, are both cases going to show, that any by-law of a municipality intending to alter the common law so as to permit horses, cattle, and other animals to run at large, must be clear and unequivocal in its language as to such permission.

The Railway Act of 1888, 51 Vict. ch. 29, sec. 194 (D.), provides "Where a municipal corporation for any township has been organized and the whole or any portion of such township has been surveyed and sub-divided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township, of the height

and strength of an ordinary division fence, \* \* suitable and sufficient to prevent cattle and other animals from getting on the railway." Judgment.  
MacMahon,  
J.

The third sub-section of section 194, was repealed by 53 Vict. ch. 28, sec. 2 (D.), and the following substituted therefor: "If the company omits to erect and complete as aforesaid any fence or cattle guard, or if, after it is completed, the company neglects to maintain the same as aforesaid, and if, in consequence of such omission or neglect, any animal gets upon the railway from an adjoining place where, under the circumstances, it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines; and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there."

The only interpretation I have been able to give to the words in the first part of the above sub-section, "under the circumstances, it might properly be," is, that it means "it might lawfully be," as in *Davis v. Canadian Pacific R. W. Co.*, 12 A. R. 724, where the plaintiff, who was a squatter on a lot adjoining that of a locatee of the Crown, and was permitted by the latter to pasture his horses on the located lot, it was held that the plaintiff's horse was properly, *i. e.*, legally on the land, so as to entitle him to recover against the railway company, by reason of their neglect to fence the lands of the locatee adjoining the railway, although such locatee was only constructively in possession of the portion thereof adjoining the railway.

Had the plaintiff's horses been placed on Tunnel Island under circumstances akin to those in the *Davis Case*, there would be no difficulty in holding that they were properly there. But so long as the Keewatin Lumber Company by reason of its being in possession under a lease from the Dominion Government, were still retaining possession, (not having been interfered with by the Ontario Govern-



Judgment.  
MacMahon,  
J.

ment) and had notified the public not to trespass thereon ; and as the plaintiff had no authority or license from the Ontario Government to enter into occupation, his horses cannot be held to have been properly thereon.

What is known as the Norman property, I assume was under license from the Crown, as it extended for some miles to the district of Keewatin. H. F. Holmes claimed possession of a small part of it near to where the horses got on the railway embankment. He had, however, given no authority to the plaintiff to put his horses there, although not objecting to their being there.

Had there been a by-law of the municipality of Rat Portage permitting horses to run at large, and had Holmes been in possession of that portion of the Norman property, then the plaintiff's horses could not be held to have been improperly on such place adjoining the railway, by reason of the nonpermission of the occupant thereof.

But there was no by-law allowing horses to run at large within the municipality, so this case does not come within the second part of the third sub-section.

I do not think R. S. O. ch. 91, sec. 82, affects this case in any way. The section seems to have been framed in ignorance of the common law rule as to the running at large of cattle.

I shall be glad if an appellate court can see its way to reach a conclusion different from that at which I have arrived.

There must be judgment for the defendants, dismissing the plaintiff's action with costs.

G. A. B.

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## [CHANCERY DIVISION.]

## RE BOWEY, BOWEY V. ARDILL.

*Will—Construction—Executory devise—Death of devisee before contingency happens.*

A testator devised his farm to his wife “to have and to hold unto my said wife until my daughter E. E. shall arrive at the age of twenty-one years. After that to my said daughter and her heirs forever, and should my said daughter die before attaining the age of twenty-one years, I give and devise the said farm to my said wife, to have and to hold unto her and her heirs forever.” The widow died intestate before the daughter, who was the only child, and who herself died intestate and unmarried before attaining twenty-one :—

*Held*, that the widow, under the second gift to her, took an executory devise in fee, which passed upon her death to the daughter, upon whose death it passed to her proper representatives.

THIS was a special case arising out of a motion for **Statement.** administration of the estate of John Bowey, testator, deceased, which motion was being made by the brothers and sisters of the deceased, but was opposed by the defendant, the executor, who denied their right to administration.

To decide this question this special case was framed under the circumstances set out in the judgment of **FERGUSON, J.**

The motion was argued on September 25th, 1891, before **FERGUSON, J.**

*Meredith, Q. C.*, for the plaintiffs. Is the right to the property to be traced from the testator, or from his widow, or from his daughter? I contend that the second gift to the widow is a simple executory devise. If so, the daughter took her interest. If, however, what the widow took was a contingent remainder, defeated by her death, then the daughter took this property as her father's heiress. I refer to *Goodtitle dem. Gurnall v. Wood*, Willes 211; *Wither v. King*, 3 Bro. P. C., 2nd ed., 135; *Goodright v. Searle*, 2 Wils. 29; *Goodtitle v. White*, 15 East. 174.

Judgment. *W. H. Blake*, for the defendant, admitted that he could not see any escape from the conclusion that all went to the daughter, and that all rights must be traced from her.

September 30th, 1891. FERGUSON, J.:—

Some time ago the matter in contention here was presented in the form of a special case, professedly under the provisions of Rule 554 of the Consolidated Rules.

The presiding Judge objected that the facts which were necessary to be known in order to determine the questions asked, had not been agreed upon, and were not stated as facts in the case drawn up, but on the contrary of this, some of them were expressly disputed therein.

The case has now been amended by striking out some of its clauses, and presenting a question differing from those before asked, the answer to which, it is said, will aid materially in the proceedings in the matter. All the facts necessary to be known for the purpose of determining or answering this question are admitted and stated in the case now presented.

The testator, John Bowey, died on the 10th day of November, 1875, leaving him surviving his widow, Mary Ann Bowey, and an only child, Elizabeth Elpeda Bowey, his heiress-at-law; and at the time of his, the testator's death, he was the owner in fee simple, in possession, of the farm mentioned in his will, which is the west half of the south half of lot number twenty, in the thirteenth concession of the township of London.

The testator had, on the 1st day of November, 1875, made his last will in the manner required by law, by which he made a disposition of this farm, and the question now to be answered arises upon the construction or meaning of that devise.

The will is fully set forth in the case stated. I need, however, only refer to the part or parts of it comprehending or affecting the disposition made of this farm.

The third clause or paragraph of the will is as follows.

“I give, and devise, and bequeath unto my said wife the <sup>Judgment.</sup> farm on which we are now living, being ” (describing the <sup>Ferguson, J.</sup> farm above mentioned), “to have and to hold unto my said wife until my daughter Elizabeth Elpeda shall arrive at the age of twenty-one years. After that to my said daughter and her heirs forever; and should my said daughter die before attaining the age of twenty-one years, I give and devise the said farm to my said wife, to have and to hold unto her and her heirs forever. And I will and direct that my said daughter shall have her support and education suitable to her station in life from the farm above mentioned, until she arrive at the age of twenty-one years, as aforesaid.”

The fourth clause of the will mentions certain charges existing upon the farm. The fifth clause provides for the case arising in which the executors and executrix should be obliged or deem it advisable to sell the farm for the purpose of meeting and paying off these charges, and it disposes of the remaining balance of the purchase money—in case of such a sale—in substantially the same manner in favour of the widow and daughter as the third clause disposes of the farm in their favour.

In this fifth clause the testator uses these words: “And when the latter ” (the daughter) “shall arrive at the age of twenty-one years, the whole sum to be paid to her; and should my said daughter die before attaining the age of twenty-one years, the whole sum above mentioned is at once to be paid to my said wife.”

The reason for referring to this clause is that it was contended, or rather suggested by counsel, that as the direction is to pay to the daughter in the one case, and to the wife in the other, neither direction could be complied with, unless the person to whom the payment is directed to be made should be living at the period designated for such payment, and that this might affect the construction of the third clause of the will. I cannot, however, take this view, as I think such direction to pay is, in each of the cases, to be considered simply a gift of the money, to take effect as an ordinary gift in like circumstances.



Judgment.  
Ferguson, J.

The testator's widow died intestate, and left her surviving her said daughter, her only child and heiress-at-law.

The daughter Elizabeth Elpeda died on the 25th October, 1888, intestate, without ever having been married, and was an infant within the age of twenty-one years at the time of her death.

On the 3rd day of May, 1881, the then surviving executor sold the farm, and, as is said in the case stated, invested the proceeds of the sale; but whether it was sold for the purposes mentioned in the will does not appear by anything that is stated or expressed.

The question that I am asked to answer is this: The deaths of the testator, his widow and their daughter having occurred in the order of time stated, from which of the three, under all the facts and circumstances stated in the case, is the right to the property to be traced? Which of the three is the *propositus*? The words of the question in the case being: "Whether upon the foregoing statement of facts, and the true construction of the will, descent is to be traced from the testator, from his widow, or from his daughter?"

In a case referred to by counsel, *Goodtitle v. White*, 15 East. 174, see at p. 194, the devise and the facts were, in a large measure, like those in the present case.

There the testator devised all his estate and effects to his wife, in trust, nevertheless, for the education and maintenance of his only daughter Mary, till she should arrive at twenty-one, and in case of her death before she arrived at twenty-one, then he gave the whole of his estate and effects to his "said" wife. The testator died leaving his widow and daughter him surviving. The widow died in the lifetime of the daughter, who died under twenty-one years of age. There, as here, the daughter was the heir-at-law of the testator, and also of the widow. The situation was fully discussed by Lord Ellenborough, and the decision, so far as it is of importance here, was that the widow took an executory devise in fee which, upon her death before the daughter attained twenty-one, descended to the

daughter, that it did not unite with, nor was merged or <sup>Judgment.</sup> extinguished in the other interest which the daughter had, <sup>Ferguson, J.</sup> and descended to the heirs of the daughter.

In the case *Goodright v. Searle*, 2 Wils. 29, it was held that an executory devise in fee is like (though not) a contingent remainder, and is transferrable to the heir of the executory devisee who dies before the contingency happens.

In *Goodtitle dem. Gurnall v. Wood*, Willes, 211, it was held that a devise to A. and his heirs, but if he die before twenty-one, then to B. and his heirs, is a good executory devise to B., and if B. survive the devisor or testator, it will descend to B.'s heir, though B. die before the contingency happens, the death of A. before twenty-one.

Counsel agreed that notwithstanding there had in fact been a conversion of the land into money, and the directions before alluded to respecting the money, the answer to the question asked by the case depends upon the true construction of clause three of the will applied to the facts stated. It was during the argument suggested that some provisions of the Act now known as the "Devolution of Estates Act" might have a bearing upon the question, but it was afterwards conceded that no attention need be paid to these provisions.

Looking at the authorities that I have referred to, the provisions of this will, and the facts of the case as stated, I am of the opinion that the widow under the second gift to her in the third clause of the will took an executory devise in fee, the contingency being the death of the daughter before attaining twenty-one; that this was a transmissible interest; that upon her death intestate it passed to the daughter as her heiress-at-law; that having so passed, it did not merge in, or become extinguished in consequence of the other interests the daughter then had under the provisions of the will, for the same person may have as distinct interests a fee, and also an interest to operate by executory devise to defeat that fee: *Mayhew on Merger*, p. 25; where it is also said that an executory interest cannot be destroyed by merger. See also the discussion on this sub-

Judgment. ject in the case *Goodtitle v. White*, above referred to. And  
Ferguson, J. I am further of the opinion that upon the death of the daughter under twenty-one, which took place as before stated, the right to this interest, the executory devise in fee, which upon the happening of that event became, I think, the estate in fee, passed to the proper representatives of the daughter. This, I have no doubt, is the conclusion at which I should have arrived in the absence of authority. I think, however, the authorities referred show that is the correct conclusion.

My answer, therefore, to the question asked is, that descent is to be traced from the daughter Elizabeth Elpeda Bowey, and not from the testator, nor from her mother, the widow of the testator. The whole interest passed to the daughter, and from her the rights are to be traced.

The case agrees that the costs here, and the costs of the motion for administration shall be out of the estate unless otherwise ordered. With the latter I have no concern so far as I can see.

The costs, however, of this special case may be out of the estate.

*Judgment accordingly.*

A. H. F. L.

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## [CHANCERY DIVISION.]

## RE THE ESSEX LAND AND TIMBER COMPANY.

## TROUT'S CASE.

*Company—Winding-up—Foreclosure or sale by petition—R. S. C. ch. 129, sec. 39—Banks—Mortgage to secure future endorsements—R. S. C. ch. 120, sec. 45.*

On a petition by a mortgagee in the winding-up proceedings of a company, under R. S. C. ch. 129, asking for the conveyance to him by the liquidator of the company's equity of redemption, the court has jurisdiction to make the usual order for foreclosure or sale.

It is a matter of discretion with the court whether an action will be directed or summary proceedings sanctioned.

A mortgage upon land given to secure endorsements upon negotiable paper to be made by the mortgagee for the benefit of the mortgagor becomes operative only upon the endorsements being made; and an assignment of such mortgage to a bank before the making of the endorsements, is not a violation of section 45 of the Banking Act, R. S. C. ch. 120.

THIS was a petition presented in the winding-up pro-Statement.  
ceedings under R. S. C. ch. 129 of the "Essex Land and Timber Company" by Edward Trout, for the conveyance by the liquidator to the petitioner of the equity of redemption in certain lands, or for foreclosure under the following circumstances :

The petitioner was president of the company, and had prior to the liquidation proceedings, and before the 27th January, 1890, become responsible to the Bank of Montreal for the sum of \$14,500 for the accommodation of the company, and was about that date requested to become further responsible, which he agreed to do, upon receiving from the company a mortgage upon the lands in question, then owned by said company, dated 27th January, 1890, conditioned as follows :

"Provided this mortgage to be void on payment of all the said mentioned promissory notes (recited as endorsed), bills of exchange, or other bank paper, upon which the said mortgagee is now, or may hereafter become liable as an endorser for the accommodation of the said mortgagors to any person or persons whomsoever, or any renewal or renewals thereof, or other bank paper, promissory notes or



**Statement.**

bills of exchange accepted for the same, or any part thereof, should such person or persons accept such other bank paper, promissory notes or bills of exchange by way of granting further time to said mortgagors, and all loss, costs, charges and expenses which the said mortgagee may be put to by reason of endorsements and renewals thereof. It being distinctly understood that this mortgage is to be considered a collateral and continuing security to the payment of all bank paper, promissory notes or bills of exchange upon which the said mortgagee may become liable as endorser for the said mortgagor, or in any other way howsoever, and taxes and performance of statute labour."

Upon the faith of the security of said mortgage, the petitioner became liable to the bank for the accommodation of the company for a further sum of \$18,000 of which \$3,000 had been repaid by the company.

At the time of the institution of the liquidation proceedings,\* the petitioner was liable to the bank for the sums of \$14,500, and \$15,000, and the mortgage had been assigned to the bank.

After the liquidation proceedings, the petitioner arranged with the bank for a reassignment of the mortgage for the purpose of trying to realize the same.

The petitioner alleged that although he was entitled to hold the mortgage for both sums, still as the lands were not worth nearly enough to pay the \$15,000 he was willing to abandon any claim on said mortgage for the \$14,500, and asked for an order authorizing the liquidator to convey the equity of redemption to him.

It was also shewn that the liquidator had offered the equity of redemption for sale by auction, and had failed to obtain any bid.

The petition was argued on September 2nd, 1891, before BOYD, C.

\* The liquidation order was dated September 9th, 1890.—REP.

*D. E. Thomson*, Q. C., for the petitioner. The case made Argument. by the petitioner shews that the time should be shortened, and the liquidator should be ordered to convey the equity of redemption. The mortgage is valid as a security for the debt incurred before its execution, as well as that incurred after, but as the lands are not worth the second debt, the petitioner is willing to abandon any claim under it for the first. There was no need under the Insolvent Act to come to the Court for leave to bring a foreclosure action; but under the Winding-up Act we have to come for leave, and being before the Court should get the proper relief at once. There are execution creditors, but they have no lien against the lands even for costs: *Blukely v. Hall*, 21 C. P. 138. Even if the lands were the property of the company, free from any mortgage, the execution creditors would have no lien except for costs: R. S. C. ch. 129, sec. 66.

*E. D. Armour*, Q. C., and *C. J. Holman*, for execution creditors. The petitioner here is in the same position as a mortgagee was under the Insolvent Act. If he wishes to realize under his mortgage he must take the usual proceedings for foreclosure or sale: *Henderson v. Kerr*, 22 Gr. 91. Although the execution creditors may have no higher right against the estate than simple contract creditors, yet for the purposes of redemption and foreclosure they are still lien holders on the land. The mortgage is void as it is not made with all the usual formalities. It is made by the vice-president and secretary to the president. The evidence shows this company was got up to enable another foreign company to deal with banking institutions in Canada. Again, the petitioner is a mere trustee of the mortgage for the bank, and the bank holds it for a debt for which they have not power to hold it as a security. It is in effect the petition of the bank to realize on a mortgage of land to liquidate their debt, and the facts show that the mortgage was given for a new advance which was made upon the bank's receiving the assignment to themselves from the petitioner.

**Argument.**

*W. M. Douglas*, appeared for the liquidator, and was willing to submit to any order made by the Court, although the lands might be disposed of to advantage if time were given.

*Thomson*, Q. C., in reply. The mortgage is under the corporate seal of the company, and so is *primâ facie* a valid mortgage until successfully attacked. *Henderson v. Kerr*, merely decides that the Court of Chancery had jurisdiction concurrently with the Insolvent Court in such cases.

September 3, 1891. BOYD, C. :—

The mortgage was given in this case to secure endorsements to be made by the mortgagee for the benefit of the company ; these were made, and to that extent the security attached on the land. The assignment to the bank prior to these contemplated endorsements did not invalidate the instrument, which upon these facts became operative only upon the endorsements being made, and the money being obtained thereon from the bank. I see no violation of section 45 of the Banking Act, R. S. C. ch. 120, upon the evidence before me.

Then as to jurisdiction under the Winding-up Act, R. S. C. ch. 129, I think it exists by virtue of section 39, and may be exercised in a summary way. My brother Meredith directed service to be made upon the subsequent incumbancers, execution creditors—they attorned to the jurisdiction by intervening to examine the petitioner, and have appeared more than once, I understand, before the Court without objecting, as is now done on their behalf.

Having regard to the law enunciated in *In re St. Cuthbert's Lead Smelting Co.*, 35 Beav. 384 (which on the facts was overruled as appears by *W. N.*, 1866, at p. 91), and the expressions of opinion in *In re David Lloyd—Lloyd v. David Lloyd & Co.*, 6 Ch. D., at p. 345, by James, L. J., I think I may act expeditiously without putting the mortgagee to the formality of an action.

I do this all the more readily because the execution creditors would not take the responsibility of asking an issue to try the validity of the mortgage, though this was offered. But I do not think the case is one in which the remedies otherwise of the mortgagee should be accelerated. I make the usual order for foreclosure or sale, and the mortgagee may exercise the right to take possession meanwhile if he will.

Judgment.

Boyd, C.

I do not read *Henderson v. Kerr*, 22 Gr. 91, as *deciding* more than that there was concurrent jurisdiction in the Court of Chancery, and the Insolvent Court in proceedings to realize a mortgage. It is a matter of convenience and discretion as to when an action will be directed or summary proceedings sanctioned, and here there has been such a considerable outlay of costs, besides delay in point of time, that I do not think I should require proceedings to be begun *de novo*.

G. A. B.

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## [CHANCERY DIVISION.]

## MURRAY ET AL V. BLACK ET AL.

*Will—Devise—Products and services charged on land—Tender of and refusal to accept—Compensation.*

A testator by his will devised his farm to his grandson charged with the supply of certain products and personal services in favour of a daughter and granddaughter.

On a disagreement between the parties a tender of the products and services was made and refused and an action was brought to have them declared a charge on the land and for a money compensation :

*Held*, that the refusal of the products did not deprive the plaintiffs of the right to recover their value but that they were not entitled to compensation for the personal services proffered and refused.

## Statement.

THIS was an appeal from a report of a Master in an action brought by Margaret Murray and Mira Murray, an infant, against John Black and William John Black and William Murray, an infant, and his father David Murray.

It appeared that one William Murray by his will devised his farm to his grandson, the infant defendant, William Murray; charged with the following rights and privileges in favour of his daughter Margaret Murray, and his granddaughter Mira Murray (the plaintiffs), viz : The use of the dwelling-house and orchard, and two acres of land, the keep and stabling of one horse and cow, the furnishing of twelve bushels of wheat, and all the wood they required cut and taken to the house, the two acres to be ploughed twice every year, and the fence to be kept in repair.

The grandson William Murray, being an infant and unable to perform these services, his father, his guardian, leased the farm to the defendants, Black, who covenanted to perform the services as part of the rent, which they did for a certain time, until disputes arose between them and the plaintiffs; who then refused to accept the services at their hands when offered, and brought this action to have the services declared a charge on the lands and to have a money compensation fixed.

The Master found that the Blacks had tendered the <sup>Statement.</sup> products and services, which had been refused by the plaintiffs, and settled certain sums as the compensation therefor, fixing certain amounts as an allowance for products to be supplied and others for services to be rendered.

From this report the infant defendant appealed, and the appeal was argued on October 1st, 1891, before Boyd, C.

*H. Cassels*, for the infant defendant, who appealed. The Master should not have allowed anything to the plaintiffs for arrears as the products and services were tendered to them and were refused. No allowance can be made for the services refused, and if anything is allowed for the products it should be allowed against the tenants. As to tender and refusal I refer to *Ripley v. McClure*, 4 Ex. 345.

*J. A. Macdonald*, for the tenants. There is no privity between the tenants and the infants. The tenants have tendered everything to the plaintiffs and they refused to accept, so the tenants are released. I refer to Addison on Contracts, 8th ed. p. 1194; *Jones v. Barclay*, 2 Douglas. 684.

*Laidlaw, Q. C.*, for the plaintiffs. There is no contract here at all. The plaintiffs are entitled to have the benefits conferred by the will charged upon the land. The refusal to accept does not work a forfeiture of the benefits.

*Cassels* and *Macdonald* in reply.

October 2, 1891.—Boyd, C.

The Master finds that the benefits given by the will to the plaintiffs were by the arrangement of all parties to be provided and supplied by the tenants, the Blacks. These benefits are of a twofold character: some of a character which admit of compensation; others not of that character. The Master further finds that the plaintiffs refused to accept services and materials from the tenants, though they offered to perform the services and furnish the materials

Judgment.

Boyd, C.

contemplated by the will. He then estimates the value of the arrears so occasioned, including items of both classes. But he should distinguish. For instance, if a bag of flour or a cord of wood is to be supplied, and these are tendered and refused: that should not deprive the person refusing from afterwards recovering the value of the flour or wood from the one who tendered. It is like the tender of money due—which is to be made good afterwards to the one who at first refused. Such refusal would only go to the question of costs. But if a day's work is to be given, and that is tendered and refused, there is an end of it; a money value cannot be placed upon the work and paid over to the one who refused the service when duly tendered.

Compensation, therefore, should not be allowed in respect of personal services proffered and declined; or in respect of pasture on the land offered and not accepted. The tenant did not profit by the refusal to accept the pasture, or by the refusal to let him cut and haul the wood, or attend to the cows and horse.

The parties should come together and settle the arrearages on this footing—failing their being able to agree it will be referred back to the Master. I may observe that the anomaly in amount between the arrears quoad the devisee and the arrears as found between him and the tenants may be probably made to disappear by this process of discrimination.

No costs of appeal, except those of infant defendant, which should be paid out of his estate.

G. A. B.

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## [CHANCERY DIVISION.]

## DAME V. SLATER ET AL.

*Husband and wife—Wife's separate estate—Agreement to charge—Possessory title—Specific performance—Costs of action and reference in.*

A husband agreed to purchase certain land, and his wife, who was married to him in 1866 without any marriage settlement, and had acquired real estate in 1870 under a deed to her, her heirs and assigns "to and for her and their sole and only use forever," joined in the agreement for the purpose of securing its being carried out and charged her land with a portion of the purchase money:—

*Held*, that the wife's land was separate estate and was properly charged. In an action for specific performance by a vendor, whose title was, to the knowledge of the purchaser, a possessory one of long standing, in conformity with a family arrangement, ample proof thereof having been offered before action, the vendor was held entitled to his costs of action and of proving his title in the Master's office.

*Games v. Bonnor*, 33 W. R. 64 followed. *Brady v. Walls*, 17 Gr. 699, and *Re Boustead & Warwick*, 12 O. R. 488, specially referred to.

THIS was a hearing on further directions in an action *Statement*. for specific performance brought by A. A. Dame as vendor against W. M. Slater as purchaser and Ordellia Slater, his wife.

The statement of claim set out the agreement for purchase and sale of certain lands in consideration of \$5,500, in which the wife had charged her own lands to the amount of one thousand dollars to secure the performance of the covenant of her husband, and alleged a tender of a deed in fee simple.

The statement of defence alleged that the plaintiff did not shew a good title; and that the wife was married in 1866, and acquired her property shortly after, and was incapable of entering into such an agreement, and that it could not be enforced against her.

On motion for judgment before MEREDITH, J., on June 3rd, 1891, it was declared that the agreement should be specifically performed, and a reference as to title was ordered, and the question between the plaintiff and the defendant Ordellia Slater, and costs, were reserved.

On the reference the Master found that the plaintiff's title was a good possessory title of over fifty-five years



**Statement.** possession, which could have been made on May 2nd, 1891, the time at which the agreement was to be carried out; that the defendant W. M. Slater previous to that time was informed that it was a possessory title, and was requested to state what evidence he required, but no requisitions were made until the 15th of July, 1891, and no evidence was actually given before the reference; and that there were about the time the reference was taken into the Master's office, mortgages in the county registry office more than twenty years old, containing covenants for title in fee simple, of which the defendant was aware, such covenants being made *prima facie* evidence of such title by R. S. O. ch. 112, sec. 1, sub-sec. 1.

The motion on further directions was argued on October 14th, 1891, before BOYD, C.

A. W. Aytoun-Finlay, for the plaintiff. The Master's findings shew that the plaintiff did everything that a reasonable man could require, and that the defendant did not want to be satisfied as to title. The plaintiff is entitled to his costs if he offered a possessory title before action, even if he did not prove it until after: *Games v. Bonnor*, 33 W. R. 64. I refer also to Sugden on Vendors and Purchasers, 14th ed., p. 417, pars. 16 and 19. Then as to the liability of the wife. The plaintiff does not claim to hold her personally responsible on the contract, but does claim to hold her separate estate responsible to the extent of the \$1,000. The deed under which she took her property is to her and her assigns "to and for her and their sole and only use forever." That makes the property *separate* property. She was married in 1866, and the part of the Married Woman's Property Act R. S. O. ch. 132, is sec. 4, sub-sec. 2, which provides that she shall hold her property free from debts, obligations, control or disposition *without her consent*, but here she gave her consent by joining in the agreement. I refer also to *Moore v. Jackson*, 20 O. R. 652; *Kerr v. Stripp*, 24 Gr. 198, and *Wallace v. Hutchison*, 3 O. R. 398.

*Hoyles*, Q. C., for the defendants. The onus is on the **Argument.** plaintiff to shew separate estate in the defendant, the wife, and he must allege it in his pleading. Unless that is done he cannot recover even if she happens to have separate estate: *Moore v. Jackson*, 16 A. R. 431. Here the marriage was in 1866, and the property acquired in 1870, and it is not separate estate: *Douglas v. Hutchison*, 12 A. R. 110. Property acquired before 1872 is not separate estate. The deed to her is in the ordinary form, and does not make it separate estate. The husband has not joined with the wife in any contract. The contracts are different, although both contained in same document: *Stogdon v. Lee* [1891] 1 Q. B. 661. There should be no costs of the reference as to title against the defendants, as they were entitled to an examination of the witnesses: *Re Boustead and Warwick*, 12 O. R. 488; 1 Dart on Vendors and Purchasers, 6th ed., p. 462, note *n*. See also *McIntosh v. Rogers*, 12 P. R., at p. 394; *Ex p. John C. Chamberlain*, 2 Ch. Ch. 352. As to word "sole," I refer to *Massy v. Rowen*, L. R. 4 H. L. 288; and cases cited in *Hulme v. Tenant*, 1 W. & T. L. C., 6th ed., at p. 546.

*Aytoun-Finlay* in reply.

October 20, 1891. BOYD, C.:—

I am content to follow *Games v. Bonnor*, 33 W. R. 64, as to the award of costs. These should be paid by the defendant, the purchaser, even though the title is a possessory one, and was first proved in the Master's office. The contest was not about the manner of proof; the defendant's conduct has been without merit—he knew that the title was a possessory one (of which ample proof was proffered before action), and that, not an adverse possession, but in conformity with a family arrangement. Nothing has been gained by the reference, except that extra expense has been incurred by the vendor, and this he should be recouped in having all the costs of litigation: *Brady v. Walls*, 17 Gr. 699, should be read in connection with *Re Boustead and Warwick*, 12 O. R. 488 (not therein cited).

Judgment.

Boyd C.

As to charging the estate of the married woman defendant I am content to follow the opinion of Chatterton, V. C., in *Hartford v. Power*, Ir. R. 2 Eq., at p. 212 (1868). I quote the passage as follows :

"I fully concede that there must be language, free from reasonable doubt as to its meaning, to deprive the husband of his legal marital rights, whether the object of the gift became his wife's before or after the gift. I also concede that the word 'sole' has not received the same technical interpretation as 'separate,' and that words to create a separate estate must fairly signify the exclusion of the husband. But still I cannot yield to the argument pressed upon me, as founded on the language of the Lord Justice of Appeal in *Massy v. Hayes*, that 'sole' does not, *ex vi termini*, signify exclusion. The primary and the grammatical meaning of that word plainly does signify exclusion: the real question to be solved is, exclusion of whom? When the woman is unmarried, and the instrument does not in terms, or from the circumstances, point this expression to a future coverture, the exclusion is now settled to be of others in general, and therefore not to apply with the required particularity to an after-taken husband. But if the woman is married, it seems to me that the exclusion most natural to occur to the mind of the donor, aware of her coverture, is that of the husband; and he can be excluded only by holding the gift to be to the separate use of his wife."

*Massy v. Hayes*, alluded to in this passage, was carried to the House of Lords, and the opinion of the Lord Justice of Ireland was affirmed; reported *sub nom. Massy v. Rowen*, L. R. 4 H. L. 288 (1869). The effect of the House of Lords' decision, as I read it, is briefly this, that the word "sole" may or may not mean "separate," according to the context. The meaning of this word will then be a matter of construction, and the canon laid down by the Vice-Chancellor of Ireland is not touched by the judgment of the Law Lords.

That the distinction noted in *Hartford v. Power*, is well taken, has been accepted by authors of high repute, of

Judgment.  
Boyd, C.

whom I may refer to Elphinstone, Norton and Clark on Interpretation of Deeds, pp. 298, 299 ; 1 W. & T. L. C., 5th ed., pp. 562-3; Lewin on Trusts, 8th ed., p. 756; Seton on Decrees, 4th ed., p. 690. *Hartford v. Power*, was also affirmed on appeal. See L. R. Ir. 3 Eq., p. 602 *n.* *Green v. Britten*, 1 D. J. & S. 649, is explicable by this canon of construction, and it is a case approved of in *Massy v. Rowen*. See also *Farrow v. Smith*, W. N. (1877), p. 21; *In re Amies' Estate*, *Milner v. Milner*, W. N. 80, p. 16; *In re Fox, Dawes v. Drwitt*, 28 Sol. J. 738.

This is the case of a deed of February, 1870, by which land is conveyed to "Ordellia Slater, wife of William George Slater," in consideration of eight hundred dollars paid by her, and with *habendum* to the said married woman, her heirs and assigns "to and for her and their sole and only use forever." She was married in March, 1866, without any settlement.

I would infer from the terms of the conveyance that she had separate money of her own with which she purchased this property as a married woman, and took the land intending it to be for her separate use, and that the conveyancing terms employed were sufficient for that purpose.

But if it is only separate estate by virtue of the Married Woman's Act, then in force, she and her husband both unite in charging it by instrument under seal, dated in April, 1891. That method of execution satisfied the law as it was in 1873 (36 Vict. ch. 18, sec. 3); it more than satisfied the law as amended in 1887 (R. S. O. ch. 134, sec. 3).

My judgment is to charge the land of the female defendant to the extent of \$1,000 as covenanted by her, and to award all costs of action against the male defendant.

G. A. B.

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## [CHANCERY DIVISION.]

## MCARTHUR BROTHERS COMPANY (LIMITED) v. DEANS.

*Crown Timber License—Right to sell pine—R. S. O. 1887, ch. 25, secs. 10, 11—Sale of pine not cut during process of actual clearing.*

A locatee of land whose rights are governed by R. S. O. 1887, ch. 25, sec. 10, or a patentee whose rights are governed by *ib.* sec. 11, though he may really intend to clear a parcel of land, cannot simply point out such parcel to a purchaser before anything is done in the way of clearing it for cultivation, and sell to such purchaser the pine timber standing and growing upon such parcel.

The right or liberty in such cases is only to cut and dispose of trees during the process of actually clearing the land for cultivation, when it appears to be and is requisite that the trees should for the purposes of such clearing be removed.

**Statement.**

THIS was an action brought by the “McArthur Brothers Company” against Matthew A. Deans, claiming damages for the alleged conversion to his own use of certain pine timber, which he claimed a title to as purchaser of it from certain locatees of the Crown, but which the plaintiffs laid claim to as licensees of the government.

The circumstances of the case sufficiently appear from the judgment of FERGUSON, J.

The action came on for trial at Barrie, on March 9th, 1891, before MACMAHON, J., and a jury, and resulted in judgment for the defendant.

The plaintiffs now moved by way of appeal before the Divisional Court, and the motion was argued on June 20th, 1891, before FERGUSON and MEREDITH, JJ.

*W. Nesbitt*, for the plaintiffs. The question is as to the true construction of R. S. O. 1887, ch. 25, secs. 10, 11. We contend that a locatee cannot cut the pine without clearing as he goes along. Under the Act pine trees are reserved: *Parker v. Maxwell*, 14 O. R. 239; *Bloomfield Peerage Case*, 2 D. & C. 344.

*Aylesworth*, Q. C., for the defendant. No hard and fast Argument. rule can be laid down. We rely on *Cockburn v. Muskoka Mills and Lumber Co.*, 13 O. R. 343; *Langmaid v. Mickle*, 16 O. R. 111; and on *Parker v. Maxwell*, cited for the plaintiffs. The policy of section 11 was to take from the patentee his rights in the pine, and give him only a restricted right. No distinction exists between a locatee selling and removing where there is a *bonâ fide* intention to clear, as there was here; and his cutting before selling. It is plain the defendant had the right to sell if he had first cut; can it make any difference that he should have sold when the timber was still on the soil? [MEREDITH, J. He is going on his statutory rights, which are "may cut and dispose of."] Here he disposed of and cut. [MEREDITH, J.—No, he disposed of and did not cut.]

*Nesbitt*, in reply. The *Cockburn Case* emphasizes the point that the defendant is acting under the statute or he is not. His right only arises when in the course of actual clearing he puts his axe to the root of the tree. It is not a mere question of intention. Otherwise, what might be done in case of heavily timbered land, would be, you could sell what belonged to the Crown—then go on and sell what hardwood you chose, and then leave it. None of these cases come within the statute.

September 5th, 1891. FERGUSON, J. :—

The plaintiffs are a lumber company, and it is not here questioned that at the time of the cutting and removal of the timber, the subject of dispute, they—the plaintiffs—held a certain timber berth, embracing the lands on which this timber was cut, and had a license from the Crown, which imparted to them a title to the timber in the berth, subject, however, to the right of locatees and patentees of the land. To state it shortly, the plaintiffs had the title of the Crown, as was said in the argument, and apparently during the trial of the action; and they sue the defendant, alleging that he, without any right or colour of

Judgment.  
Ferguson, J. right, wrongfully entered upon certain lots of land embraced in their license, and cut and removed therefrom large quantities of timber, and they claim from the defendant a large sum of money.

The defendant after denying the allegations of the plaintiffs, says, by way of defence, that the lands—lots—referred to were located under the provisions of chapter 25 R. S. O., and that the locatees of the lands cut timber thereon in the *actual process* of clearing the land for cultivation, and sold a portion of such timber as they lawfully might under sections 10 and 11 of said chapter 25, and that he, the defendant, purchased a portion of the timber so cut.

There is not any question as to the identity of the lands or the timber, and it seems taken as granted that the plaintiffs' title to the timber was good, unless the defendant acquired a good title by his purchase from the locatees. The locatees from whom the defendant purchased, were respectively Peddie, Fountain, and Hall, of whom one, Peddie, was patentee.

If these locatees cut the timber and disposed of it (by selling it to the defendant) in accordance with the provisions in this respect in favour of locatees and patentees respectively, contained in sections 10 and 11 of the Act, the defendant would appear to have acquired title to the timber and be entitled to succeed in the action. The matter in difference is really a question of title, and the plaintiff's title is as if admitted, unless the defendant shews title under the provisions of these sections of the Act.

It does not appear, I think, that the timber was cut by the locatees (as stated in the defence) in the "actual process of clearing the land for cultivation," if these words are to be taken literally. The defendant in his own evidence says that all he got off Peddie's lots were in two parcels, that Peddie blazed out and shewed him as where he was going to clear.

In regard to the purchase from Hall—through Heron—the defendant says he was simply shewn the place, and he

blazed around the parcel containing the timber himself. Judgment.  
As to the purchase from the locatee Fountain, the defendant says the land was in bush, and Fountain told him that he was going to clear it, and he does not know whether it was ever cleared or not. This seems to indicate the state of things at the time the sales were made to the defendant. The defendant, the purchaser, cut the timber and took it away to his mill, being assisted in some of the instances by the vendor. Some of the vendors have since cleared the lands on which the timber was, and some have not.

In the case of the purchase from Peddie the jury have found that Peddie's object in "cutting" the pine timber sold the defendant was to clear the land for the purposes of cultivation, and in each of the cases of Fountain and Hall that the object in "cutting" the pine trees was to get them out of the way of clearing the land for cultivation. They also found that twenty-two months would be a reasonable time to allow for clearing land, and that in each of the three instances, the delay in clearing the land was occasioned by unfavourable weather.

There were many matters of importance not in dispute at the trial, and the learned Judge, after the findings of the jury, directed judgment to be entered for the defendant. No question arose as to the right of the locatees to cut and use such trees as might be necessary for the purposes of building or fencing. After going through the whole case, as well as I have been able, the real and substantial question seems to me to be this: can a locatee, whose rights are governed by section 10 of the Act, or a patentee whose rights are under section 11, when he really intends to clear a parcel of land, simply point out such parcel to a purchaser before any thing is done in the way of clearing it for cultivation and make a good sale to such purchaser of the pine timber standing and growing upon such parcel?

It was conceded at the bar, and it appears to me rightly so, that the provisions in each of these sections that are of importance here, are in effect alike.



Judgment.  
Ferguson, J. The material words of the 10th section are : " And may also cut and dispose of all trees required to be removed in the actual clearing of the lands for cultivation ; but no pine trees (except for the purpose of building and fencing as aforesaid) shall be cut beyond the limits of such actual clearing."

I think this right or liberty is only to cut and dispose of trees during the process of actually clearing the land for cultivation, when it appears to be and is requisite that the trees should, for the purposes of such clearing, be removed ; and I do not see that any one of the three purchases made by the defendant, was made under these circumstances. If there exists only the intention to clear for the purpose of cultivation, and an opinion that the removal of certain pine trees will be required in such clearing, when it takes place, and a sale of pine trees is made, followed by a removal of the same, and such intention is changed, or from some cause, whether within the control of the locatee or patentee or not, such clearing does not take place, it cannot, in such case be said that no pine tree has been cut beyond the limit of the actual clearing.

The legislature seems to have been careful to guard the rights in respect of this pine timber ; and I do not think they have left the matter subject to the hazard arising in the case that I put, and the words of the Act seem to me plainly against it.

In the circumstances, I do not think there is force in the argument that it is much more convenient and inexpensive to remove the pine timber before the work of clearing actually commences, than afterwards, assuming such to be a fact. The legislature made the exception in favour of the locatee or patentee, and when he seeks to avail himself of it, he must take it as it is, with all its inconveniences, if any there are.

The question here, as before stated or intimated, is one of title ; and, attaching the meaning I do to the words of the Act, I am unable to see that the defendant, even assu-

ming the findings of the jury to be correct, by the purchases that he made, or any of them, obtained any title to the timber supposed to be purchased; and this being so, the title was in the plaintiffs; who are, in my opinion, entitled to recover in this action and to their costs against the defendant. I understand that in such case the amount of damages has been agreed upon.

Judgment.  
Ferguson, J.

I do not see any objection to the costs being disposed of as stated at the conclusion of the judgment of my brother Meredith. That mode seems logical. It may occasion trouble upon a taxation, and may not make much difference in the result. Costs as stated by my brother Meredith.

MEREDITH, J.:—

It seems to me to be important to first trace the right of property in the pine trees in question before they were severed from the land.

It appears plain that no title to such as are in question in this action passed to locatee or patentee; the pine trees are expressly reserved and excepted, and the property—at all events in such of them as are in question in this action—remained in the Crown; the locatee or patentee having only the right to cut and dispose of them in the manner, and under the circumstances, provided for in the Act; that is, when required to be cut in the actual clearing of the land for cultivation, and not beyond the limit of such actual clearing.

I am, therefore, unable to perceive what right or power the locatee or patentee had to sell these trees, standing and growing as they were, to the defendant; or, how any right of property in them passed to the defendant, under such sale, as against the Crown.

And, in my opinion, the very words of the Act plainly lead to the same conclusion; that the locatee or patentee cannot divest the Crown of the right of property in such pine trees, until they have been severed from the land in the manner, and for the purpose, before mentioned.

Judgment.  
Meredith, J.

He may "cut and use" for building and fencing on the land; and he may "cut and dispose of" "all trees required to be removed in the actual clearing of the land for cultivation," and "pine trees cut in the process of clearing, and disposed of," shall be subject to the payment of dues, etc. Where is the right or power here given to sell and permit the purchaser to cut? And these are the only rights or powers given to locatee or patentee in, or to such trees. There is the right to cut, and when cut, in the one case, to use, and in the other, to dispose of.

Then the lands are "free grant" lands; and the locatees must be actual settlers (section 3), desiring the lands for the purpose of actual settlement and cultivation, and not for the purpose of obtaining, possessing or disposing of any of the pine trees growing, or being thereon; and the locatee (section 8) is to clear and cultivate at least two acres of the land each year for the first five years, and do other settlement duties; the Act seeming to contemplate the work of clearing and cultivation being done by the settler; and the right to cut and dispose of pine trees seeming to be given merely to permit a complete clearing for the purpose of cultivation; the removal of the obstacle otherwise standing in the way of that.

Apart from any rule of construction favouring the Crown, it seems to me to be reasonably plain, upon the very words of the Act, that neither locatee nor patentee in this case, had any title to the pine trees in question, nor any right or power to sell them to the defendant, as they attempted to do, before such trees were cut down in the actual clearing of the land for cultivation.

I fear the care taken by the legislature to prevent persons taking free grants "for the purpose of obtaining, possessing or disposing of any of the pine trees growing or being on the land, or any benefit or advantage therefrom" (section 7) would not be quite effectual if locatee or patentee have power or right to sell as was here attempted to be done. If a sale of pine trees on six acres, and twenty-two months—under favourable weather and circumstances—

ahead of actual clearing for cultivation, why not many more acres in extent, and much longer time in advance? Is it not against the policy of the legislature, apparent in the Act, to uphold a sale such as any of those here in question?

Judgment.

Meredith, J.

The case of *Parker v. Maxwell*, 14 O. R. 239, so far as it throws any light upon the questions involved, sustains these views. The Chancellor there says, at p. 243: "All standing pine belongs to the Crown; when cut during the process of actually clearing the land for cultivation, or in order to build on the location, it belongs to the locatee; otherwise when cut, it remains the property of the Crown. \* \* Where the clearance is, all are to be removed, and as to pine in the clearance so removed, the Crown waives its right in favour of the locatee." And "he failed to do the act," (that is, he did not cut down the trees), "by which he might have converted them to his own use." And see also the observations as to the right to cut for building and fences, and the limit as to time and purposes for so cutting.

Neither *Anderson v. Muskoka Mill and Lumber Co.*, 13 O. R. 343, relied on by the defendant; nor *Dunkin v. Cockburn*, *ib.* 254, aid him as to the matter here in question. There the trees were cut down by the settler, in process of the actual clearing for cultivation, before they were sold.

It may be observed that the statement of defence seems to have been drawn in this view of the locatees' and patentees' right; not that they had the title to the trees or any right to sell until cut.

The plaintiffs having acquired the Crown's right to the trees in question, and standing in the Crown's right as to them, I would therefore allow the motion, and direct judgment to be entered up in favour of the plaintiffs for the amount agreed upon between the parties, on the ground only, that there was no right or power in the locatees or patentees to sell the pine trees to the defendant, as they did, and that the defendant acquired no title to them as



Judgment. against the plaintiffs; with costs of the action, except such  
Meredith, J as were incurred in respect of the issues of fact found  
against the plaintiffs, which cannot be disturbed; and  
allowing the defendant his extra costs of the action in  
respect of such issues, to be set off against the plaintiffs'  
costs *pro tanto*.

A. H. F. L.

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[CHANCERY DIVISION.]

MARTIN V. HUTCHINSON.

*Landlord and tenant—Clandestine removal of goods by tenant—11 Geo. II., ch. 19—Counsel's advice—Reasonable and probable cause—Action for malicious prosecution.*

A tenant is not liable to prosecution under 11 Geo. II., ch. 19, for the fraudulent and clandestine removal of goods from the demised premises unless such goods are his own property, nor can goods which are not the tenant's property be distrained off the premises.

In an action for malicious prosecution, the jury having found the facts in dispute, the question of reasonable and probable cause is for the Judge.

Where a prosecutor has *bonâ fide* taken and acted upon the opinion of counsel in the proceedings taken by him, laying all the facts of the case fully and fairly before such counsel, this is itself evidence to prove reasonable and probable cause.

THIS was an action for malicious prosecution brought by Frederick Martin against Thomas Hutchinson, claiming \$5,000 damages, upon the ground that the defendant falsely, maliciously, and without reasonable and probable cause, on January 14th, 1891, laid an information before the police magistrate at Toronto, wherein he charged the plaintiff with, on January 8th and 9th, 1891, while he owed the defendant certain arrears of rent, unlawfully, fraudulently, and clandestinely carrying away from the house and premises, No. 46 Spadina Avenue, Toronto, (of which house the plaintiff was a monthly tenant to the defendant), certain chattels to prevent the defendant from distraining the same for the arrears of rent against the

form of the statute, in such case made and provided: \* Statement. and that the defendant procured a summons to be issued, upon return of which the magistrate, after hearing the evidence, acquitted the plaintiff.

By his statement of defence, the defendant after denying that he had proceeded falsely and maliciously, and without reasonable or probable cause, set up that the plaintiff was tenant to him of the premises, No. 46 Spadina avenue, and indebted to him for rent in a sum of \$162.80, which sum he claimed by way of counter-claim.

The action came on for trial before STREET, J., and a jury, at the Toronto Spring Assizes, when the jury failed to agree on a verdict. Subsequently on April 6th, 1891, the learned Judge delivered a judgment as follows, nonsuited the plaintiff.

\* The statute in question 11 Geo. II., ch. 19, sec. 1, provides:—"In case any tenant or tenants \* \* of any messuages, lands, tenements or hereditaments upon the demise or holding whereof any rent is or shall be reserved, due or made payable shall fraudulently and clandestinely convey away or carry off or from such premises, his, her or their goods or chattels, to prevent the landlord or lessor \* \* from distraining the same for arrears of rent so reserved, due or made payable, it shall and may be lawful to and for every landlord or lessor \* \* within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels, wherever found, as a distress for the said arrears of rent; and the same to sell, etc.

Sec. 3. If any such tenant or lessee shall fraudulently remove and convey away his or her goods or chattels as aforesaid \* \* all and every person so offending shall forfeit and pay to the landlord or landlords \* \* double the value of the goods by him, her or them respectively carried or concealed as aforesaid \* \* .

Sec. 4. When the goods and chattels so fraudulently carried off or concealed shall not exceed the value of £50, it shall and may be lawful for the landlord or landlords from whose estate such goods or chattels were removed \* \* to exhibit a complaint in writing \* \* before two or more justices of the peace \* \* and upon full proof of the offence \* \* the said justices of the peace may and shall adjudge the offender or offenders to pay double the value of the said goods and chattels to such landlord or landlords \* \* .

Judgment. STREET, J. :—

Street, J.

This was an action brought against the defendant, by the plaintiff, for maliciously and without reasonable and probable cause laying an information before the police magistrate of the city of Toronto, charging him with fraudulently removing goods of the value of less than fifty pounds with the intention of preventing the landlord recovering his rent. Only a summons was issued; and upon that summons the plaintiff appeared and the matter was adjourned, and he appeared again; then the summons was discharged. Thereupon action was brought by the plaintiff against Hutchinson, for having maliciously issued the summons, or caused the summons to be issued. In my opinion, the action appears to be a very trivial one indeed; however, as it is in Court, it must be dealt with according to the strict rights of the parties. At the trial the jury disagreed. The evidence was ample, that the defendant had reasonable and probable cause for believing that the plaintiff had fraudulently removed the goods for the purpose charged; and the only question was whether he had reasonable cause for asserting that the goods were under the value of fifty pounds: he stated that he had only been in the house once, and only been in one room of the house, and from what he saw of the furniture he supposed and believed that the value of the furniture in the house was about \$500. When he went before the police magistrate, this matter was discussed, and he was advised by his solicitor, who prepared the information, and also by the clerk of the police magistrate, that he was justified in deducting from the value of the goods in the house the value of the exemptions, which would bring the value of the goods below \$250; and upon that he swore that he believed the value of the goods so removed, *after deducting exemptions*, would not exceed the sum at which he placed them, \$250. There was no evidence whatever to controvert that; and the question is whether he had sufficient before him to justify him in

stating the value of the goods to be under \$250. The question always arises, what further he should have done. The goods were in the possession, at the time, of a hostile person, who could hardly have been expected to allow him to go into the house to examine and value the goods. I think, under the circumstances, that there was sufficient to justify him in the conclusion at which he *bonâ fide* arrived, that the value of the goods did not exceed \$250, and that therefore there was reasonable and probable cause for his laying the information. Then, there is also the question of malice. The plaintiff put in certain answers of the defendant to questions put to him on examination before trial, in which the defendant had sworn that the only object he had in taking the proceeding was to recover the debt which was due him. That was a perfectly legitimate object. It was sworn, and not contradicted—his solicitor was put in the box—and it appeared the defendant had acted in the matter entirely under the advice of his solicitor; and he stated to his solicitor his knowledge, how his knowledge was arrived at of the value of the goods. Now, although that fact is not conclusive upon the ground of malice, yet it is a circumstance entitled to great weight where there is no evidence whatever of the existence of malice. Here there is absolutely no evidence of malice, unless it is to be presumed from misstatement of the value of the goods; that misstatement appears to have been made under a *bonâ fide* belief in its truth; so I think there is not only no evidence of the absence of reasonable and probable cause, but there was no evidence whatever of malice to be submitted to the jury; I think therefore, after having reserved, as I did for further consideration, at the conclusion of the case, the question of a nonsuit, that a nonsuit should now be entered, and that the plaintiff's action be dismissed with costs.

Judgment.  
Street, J.

The plaintiff moved by way of appeal before the Divisional Court, and the motion was argued on June 12th, 1891, before FERGUSON and ROBERTSON, JJ.



**Argument.**

*McCullough*, for the plaintiff. The plaintiff was not the owner of the goods, and hence there could not be a prosecution of him under 11 Geo. II., ch. 19, sec. 1: *Tomkinson v. Consolidated Credit and Mortgage Corporation (Limited)*, 62 L. T. R. 162; *Woodfall's Landlord and Tenant*, 13th ed., p. 467. The defendant did not take proper care to inform himself of the true state of facts, nor can he rely upon the advice of counsel which he sets up: *Brewer v. Jacobs*, 22 Fed. R. 217; *Hobbs & Co. (Limited) v. Hudson & Co.*, 62 L. T. R. 764; *Guthrie Smith on Damages*, 2nd ed., p. 300; *Parry v. Duncan*, 7 Bing. 243; *Inkop v. Morchurch*, 2 F. & F. 501; *John v. Jenkins*, 1 C. & M. 227; *McGill v. Walton*, 15 O. R. 389, 395.

*J. Reeve*, Q.C., for the defendant. If there was the right to follow the goods or bring the action, there was the right to lay the information. Each one of the three remedies rests on the same foundation. The information may be laid though the goods are not the property of the tenant: *Opperman v. Smith*, 4 D. & R. 33. There was rent in arrear; there was the apparent fraudulent intention in the removal of the goods, while their value was after taking out exemptions not more than \$200. Moreover the defendant acted under the advice of his solicitor throughout.

September 5th, 1891. FERGUSON, J.:—

The action is for malicious prosecution. A motion for a nonsuit was made and the judgment or ruling thereon reserved. The case was sent to the jury and they disagreed and failed to find a verdict. The learned Judge afterwards gave judgment upon the motion, whereby it was directed that a nonsuit be entered and the action dismissed with costs.

The present motion is against this conclusion of the trial Judge and for a new trial.

I agree with the learned Judge that the action is of a trivial character, but as he says, the action being in Court it must be dealt with according to the strict rights of the parties to it.

The prosecution that gave rise to this action, was for an alleged fraudulent removal of goods by a tenant, the plaintiff herein, such prosecution being by the defendant herein, his landlord.

Judgment.  
Ferguson, J.

The learned Judge arrived at the conclusion that the defendant had reasonable and probable cause for doing as he did in the prosecution of the plaintiff, and that for this reason the action failed, the alleged malice being repelled, as one would suppose, by the existence of such reasonable and probable cause. The learned Judge does, however, deal more or less with the question of actual malice.

If the ruling that there was reasonable and probable cause was right, and was based upon a proper foundation, the motion here must, I think, fail. It is laid down that the plaintiff must give some evidence of want of probable cause, and this on the general issue: *Walker v. South Eastern R. W. Co.*, L. R. 5 C. P. 640, 644. And in the same case it is said that this is frequently done where the prosecution was before a magistrate, by putting the depositions taken before him in evidence. This was done, as I understand, in this case, but the matter is not the one that is really material here.

Where there are no facts, nor any inference from facts in dispute, "reasonable and probable cause," was always held to be a question to be determined by the Judge alone. See *Panton v. Williams*, 2 Q. B. 169, at 192, (in Exchequer Chamber), also *Michell v. Williams*, 11 M. & W. 205.

Where, however, the question of reasonable and probable cause depends on numerous and complicated facts, and inferences to be derived from them, there is, as is said in *Roscoe's Nisi Prius* (a), much confusion amongst the earlier cases as to the respective provinces of judge and jury. It seems now, however, settled that the question must be decided by the Judge in this case also, for it is his duty to inform the jury, if they find the facts proved and the inferences to be warranted by such facts, that the same do or do not amount to reasonable and probable cause, so as

Judgment. thereby to leave the questions of fact to the jury, and the  
Ferguson J. abstract question of law to the Judge: *Lister v. Perryman*, L. R. 4 H. L. 521. When there are complicated facts and inferences to be derived from them, in order to decide the question of reasonable and probable cause, this seems to be the way in which the matter is to be dealt with, so that only the abstract question of law is really determined by the Judge. The same is, of course, the case, when there are no facts or any inferences of fact in dispute, for then necessarily the sole question is one of abstract law.

Some of the learned Judges in *Lister v. Perryman*, however, say that probable cause is an inference of fact rather than an abstract question of law, though all agree in saying it is for the Court and not for the jury.

The late case *Abrath v. The North Eastern R.W. Co.*, 11 App. Cas. 247, is one in which questions were submitted to the jury, one being as to whether or not the defendants had taken reasonable care to inform themselves of the true facts; and the other as to whether or not the defendants honestly believed the case they had laid before the magistrates. I do not see from a perusal of this case that it contains any departure from any of the principles of law in the former cases.

In *Lister v. Perryman*, it is said that no definite rule can be laid down for the exercise of the judge's judgment. It is laid down, and seems to be not at all doubted or questioned, that as a rule of law, the jury must find the facts on which the question of reasonable and probable cause depends, unless the case is such that there are no facts, nor any inference from facts in dispute.

In the present case there were many facts that were undisputed facts. The rent was in arrear. Many applications for payment of it were made. Even threats of proceedings had been used. The letter of the 26th of December was written asking for the month of January in which to pay, saying that before the end of that month three months rent would be paid. On the 8th of January

the tenant began to remove the goods, not having given <sup>Judgment.</sup> the landlord any notice, and without the landlord's know- <sup>Ferguson, J.</sup> ledge, and on the 12th of January, after the removal had been completed, the tenant wrote the landlord saying where he then lived, etc. All these facts seem to have been entirely undisputed, and if they embraced the whole case the ruling of the learned Judge would, so far as I am able to perceive, have been quite right.

There was, however, an important fact, at least, so it seems to me, which does not appear to have been brought prominently before the trial Judge, namely: The goods that were removed were not the plaintiff's (the tenant's) own goods, and this was a fact known to the present defendant the prosecutor.

As nearly as I can understand the matter, the statute under which the prosecution professedly took place does not apply to such a case. Counsel argued that although the goods (which were the property of the plaintiff's wife and her children of a former marriage) could be taken as a distress while on the leased premises, they could not be followed and taken as a distress elsewhere under the provisions of the statutes on the subject, as could the goods of the tenant himself, if such goods had been removed within the meaning of the statutes, but that the prosecution might nevertheless properly take place under section 4 of the Act 11 Geo. II., ch. 19. The sections of the Act preceding this one refer specifically to goods of the tenant, and speak of them as "his or her" goods; and it is stated in Woodfall on Landlord and Tenant, 13th ed., p. 469, that the statute applies to the goods of the tenant only, and that a defence justifying the following of the goods off the premises, and distraining them for rent in arrear, must show that they were the tenant's goods. The reference is to *Thornton v. Adams*, 5 M. & S. 38, in which case Lord Ellenborough said, amongst other things: "Whereas the language of the first and third clauses of the Act of Parliament is explicit; it says his or her goods; and there seems to be no reason for supposing that the seventh section



Judgment.  
Ferguson, J. meant any other goods so here, the third section refers to the goods of the tenant as 'his or her' goods, and the fourth section provides that where the goods and chattels *so fraudulently carried off or concealed* shall not exceed the value of £50, etc.;" manifestly, I think, having reference to such goods as are mentioned or referred to in section three. The words of section seven referred to by Lord Ellenborough in the case above, are much more general than these, for it enacts that "where any goods or chattels," etc. I have not found a decision on the precise point. I, however, think there is stronger reason, if that were necessary, for saying that the goods that are referred to in section four are the goods of the tenant himself than are presented by the reading of section seven for saying that the goods there referred to are the goods of the tenant only; and besides it may be remarked that section four contains a penal element, and section seven does not.

The case relied on for supporting the contention opposite to this was *Opperman v. Smith*, 4 D. & R., at p. 36, where Best, J., said: "The Statute 11 Geo. II., ch. 19, in my opinion, applies to all cases where the landlord is, by the conduct of his tenant, turned over to the barren right of bringing an action for his rent." In that case the removal was of the tenant's own goods, and there was no question of the kind raised here. The language of the learned Judge cannot be applied to a case like the present one at all. It seems clear to me that it could not have been intended so to apply. If it could so apply, it would show entirely too much, for it must then be applied to cases in which it is here admitted as shown by many cases that such a view could not be entertained.

If then, as was admitted, the goods were not the goods of the tenant, and the view of the law that I have taken is correct, the prosecution complained of was in fact without any authority or warrant. It appears, however, in the evidence, that the defendant laid the case before counsel for advice; that he received such advice; and there is some evidence going to show that in instituting the prosecution

he acted upon it. Presumably, one would say that he did Judgment.  
so. Ferguson, J.

In Roscoe's *Nisi Prius Evidence*, 16th ed., vol. 2, p. 886, under "evidence of want of probable cause in actions for malicious prosecution," it is laid down: "If a defendant has laid all the facts of the case fully and fairly before counsel, and acted *bonâ fide* upon the opinion given, (however erroneous it may be) it will be evidence to prove probable cause." The references are *Ravenger v. Macintosh*, 2 B. & C. at p. 697, and *Hewlett v. Cruchley*, 5 Taunt. 277. These cases, although they decide many other things, are authority for the statement in the text of Roscoe; and such, so far as I have been able to see, may be considered the law upon the subject.

Assuming then that there was no legal ground for the prosecution of the plaintiff by the defendant, it seems absolutely necessary for the defendant to disclose some reason or justification for instituting it. The evidence may show that the whole case was fully and fairly laid before counsel, and that the defendant acted *bonâ fide* upon the opinion given; but these, I think, are far from being "undisputed facts," upon which a Judge could act in determining the question of reasonable and probable cause without the intervention of the jury. If these were admitted as facts, the matter would be different. As the case is, it must, I think, be submitted to a jury. I may add that I am not satisfied that the facts appearing touching the value of the goods, are sufficiently of an undisputed character to fully authorize the Judge or a Court to employ them as undisputed facts in considering and determining the matter of probable cause.

For these reasons, which appear to me sufficient, I am of the opinion that the nonsuit and judgment should be set aside, and a new trial had between the parties. The costs of this motion and of the former trial should, I think, abide the final event of the action.

New trial—all costs to abide the final event.

Judgment. NOTE.—Owing to the want of importance of the matter  
Ferguson, J. in contention, I am sorry to arrive at this conclusion, but  
I cannot arrive at any other.

I do not see that what I have said is the proper conclusion, is at variance with either of the cases *Hamilton v. Cousineau*, (a) or *McLaren v. Archibald*, (b) both peculiar cases and now pending in the Court of Appeal.

ROBERTSON, J.:—

I am of the same opinion. It was for the jury to say whether the defendant, the prosecutor, before laying the information against this plaintiff had laid all the facts of the case, fully and fairly before counsel, and acted *bonâ fide* upon his opinion or advice. If he did so (no matter how erroneous that opinion may have been) the cases determine that it will be evidence of reasonable and probable cause. In my judgment there is no doubt as to the state of the law as between landlord and tenant, in cases where there has been a clandestine removal—these goods must be the goods of the tenant—the goods of another person, while on the premises, in a case like this, would be liable to seizure for rent in arrear, but the moment they are removed from off the premises, even to the curb stone, no such liability attaches. Here this prosecutor knew, there is no dispute about that, that these goods were not the goods of the tenant, a fact which he should have made clear to the counsel, whose advice he was seeking; if he did, and he was advised to take the steps which led to this action, no matter how erroneous, and he acted *bonâ fide* on that advice, I think that afforded strong evidence of probable cause. Leaving for the present the hardship, which such a state of things may create, I think the defendant should satisfy the jury that he himself, did not of his own knowledge know the law on the point, and that he was relying entirely upon counsel's advice, because, had he

(a) Queen's Bench Divisional Court, December 31, 1890.

(b) Common Pleas Divisional Court, December 20, 1890.

been of a different opinion himself, the law being otherwise Judgment.  
than counsel had advised, I do not think he could bring Robertson, J.  
himself within the rule which would enure to his benefit.  
He must have acted *bonâ fide* on the advice given, and not  
colourably, not merely because he had found counsel who  
might so advise. The evidence on the point is that of the  
counsel, and is as follows :

“ He (prosecutor) stated that in all probability the goods  
would be claimed, or could be claimed by Mrs. Lee ; he  
stated that the goods belonged to her or to her family.  
\* \* My opinion was that the only goods that would  
come in question, would be the goods outside the exemp-  
tions,” (as I understand the meaning of the witness, such  
goods as are exempt under section 27 of ch. 143, R. S. O.,  
1887). “ And it was only in respect of these goods the  
landlord could suggest any fraudulent removal.” Then  
again, the question is put on cross-examination.

Q. “ He said to you he thought the goods would be  
claimed by Mrs. Lee ? A. It was a mere suggestion, he  
thought they would. Q. You had no reason to think  
otherwise than that ? A. No. Q. You thought they  
were owned by Mrs. Lee ? A. Yes, I thought so. Q.  
All the goods in the house ? A. I cannot say ; that is all  
that took place ; I think he remarked that, in all proba-  
bility the piano would be the daughter’s and the other  
goods belonged to Mrs. Lee.”

From this, it strikes my mind as being very apparent  
that the counsel did not appreciate the question which is  
now presented, nor was the attention of the learned  
trial Judge drawn thereto. What the counsel advised on  
was, whether there was such a clandestine removal as  
would entitle the landlord to follow the goods ; that in order  
to give him the statutory right to do so, the actual owner-  
ship in the goods did not present itself ; it was assumed  
that the goods were such as were liable to be followed off  
the premises, in case of clandestine removal. It is evi-  
dent there was no argument before the learned Judge on  
the point ; if it was mentioned, it was not pressed.



Judgment. I think therefore taking into account, for argument sake, Robertson, J. that the plaintiff suffered a wrong at the hands of this defendant, but that he the defendant can escape the consequences of his act, because he acted *bonâ fide* on the advice of counsel, erroneously given, it should be established to the satisfaction of the jury that he did so act, and that he placed all the facts fairly, and freely, and without any reservation, but wholly before counsel in such a way as to enable him clearly to advise upon the points. That has not been done, I think, but a jury may think differently ; in fact, now that this has become the important question in this action, another trial will no doubt clear up any doubt on the points, and the nonsuit should therefore be set aside and a new trial had between the parties, all costs to abide the event.

A. H. F. L.

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## [CHANCERY DIVISION.]

## BROOKE V. TORONTO BELT LINE RAILWAY COMPANY.

*Railways—Expropriation of land—Deviation from original plan—Necessity for plan of deviation—R. S. O. ch. 170, sec. 10, sub-sec. 7—Notice to treat—Offer of cash and privileges—Certificate of surveyor—Sec. 20, sub-secs. 1 & 2—Jurisdiction of County Judge—Injunction.*

Under "The Railway Act of Ontario," R. S. O. ch. 170, a railway company having filed an original plan shewing the location of its line and desiring to acquire other land compulsorily for the purpose of an alteration from the original location, however small the deviation may be, must file, under sub-section 7 of section 10, a plan of the proposed deviation.

*Semble*, under the Dominion Railway Act this requirement must also be observed.

The notice required by sub-section 1 and the certificate of a surveyor under sub-section 2 of section 20 of "The Railway Act of Ontario," should state in *cash* the sum which would be a fair compensation for the lands to be taken and damages.

And where a railway company without having filed any plan of a proposed deviation applied for and obtained from a County Court Judge a warrant for possession on a notice in which in addition to a sum in cash certain crossings and station privileges were offered as compensation for the land and the damages, and which was accompanied by a surveyor's certificate that the sum offered was a fair compensation therefor:—

*Held*, that the foundation of the Judge's authority to issue a warrant rested on a proper compliance by the railway company with the above sub-sections, and that he had acted herein without jurisdiction.

The High Court of Justice has power to restrain railway companies from acting upon warrants so obtained, and it is not necessary to proceed by *certiorari*.

THIS was a motion for an injunction by Betsey Johnson Statement.  
Brooke and John Edmond Brooke, tenants for life in possession and trustees of part of the estate of the late Daniel Brooke the elder, to restrain the Toronto Belt Line Railway Company from taking possession of certain land, parcel of the said estate, under a warrant which had been obtained from a County Judge.

The evidence shewed that the company, which was incorporated under a provincial statute, had deposited a plan under sec. 10 R. S. O. ch. 170, shewing certain land required for the purposes of the railway, and that subsequently they had decided to take other land in the same neighbourhood, with partially changed limits and boundaries which embraced part of what was shewn on the plan.

**Statement.** Without having deposited any new plan shewing what they actually desired to take, the company gave a notice under sub-sec. 1 of section 20, accompanying it with a surveyor's certificate under sub-sec. 2, section 20.

On this material they applied to the County Judge for a warrant for possession, when an injunction was applied for and obtained.

The motion to continue the injunction was made on the 22nd of August, 1891, before STREET, J.

*Shepley, Q. C., and W. D. McPherson*, for the motion. This company has not power to expropriate land at all. The Railway Act of Ontario R. S. O. ch. 170, clearly contemplates that the power to take land should be contained, if granted at all, in the special Act. No such power is contained in the special Act, 52 Vic. ch. 82 (O.), incorporating the defendant company, therefore they have not power to expropriate: see the definition of "The lands," R. S. O. ch. 170, section 2, sub-sec. 3. The power to take lands must be given in a special Act: section 6. The special Act, section 2, authorizes the defendant company merely "to lay out, construct and complete a double or single iron or steel railway of a gauge of four feet eight and one-half inches in width from some point on the line of the Grand Trunk Railway in the eastern part of the city of Toronto, or in the township of York, passing to the north of the said city in the said township and connecting with the said railway and the Great Western division thereof to the north-west and west of the said city in the said township, or in the town of West Toronto Junction," etc. The defendant company have filed two plans shewing an intention to construct their railway in two loops called respectively the eastern and western loop, which are separate and independent of each other, and either of which can be fully and completely operated without going over any part of the other. The plaintiffs' property is situated on the western loop, which does not take its rise from some point

on the line of the Grand Trunk Railway in the eastern Argument.  
 part of the said city or in the township of York, and does not pass to the north of the said city, and does not make the required connections, and is therefore not part of the road chartered; but is the whole of a road not chartered. If the defendants can construct two railways they can construct more; there is no limit. [STREET, J.—I decided on a former occasion that the defendant company had the power under the general Railway Act to expropriate lands, and that they were not bound to build their road in one continuous line so you need not argue those two points.] The plan filed does not show an intention to expropriate the lands described in the order of the County Judge. There is a variance in the description from that shewn on the plan filed. There is no plan filed shewing the lands to be taken, and the defendants cannot proceed without such plan. This is not a deviation: *Murphy v. The Kingston and Pembroke R. W. Co.*, 11 O. R. 302, 582; 17 S. C. R. 582; *Re Kingston and Pembroke R. W. Co.*, and *Murphy*, 11 P. R. 304. The County Judge had no power to allow any amendment of the plan or notice after service of the same: *Stone v. The Commercial R. W. Co.*, 4 M. & C. 122; *Ecclesiastical Commissioners v. Commissioners of Sewers, etc.*, 14 Ch. D. 305. There was no application made under sub-sec. 1 of section 19 to the owner, and it is not shewn that there was any disagreement, which is a condition precedent to the service of the notice: *Wilkes v. Gzowski*, 13 U. C. R. 308; *Re Watson v. Northern R. W. Co.*, 5 O. R. 550. The surveyor's certificate does not comply with the statute. The compensation offered is partly money and partly station privileges, crossings, etc. The owners are entitled to all their compensation in money. The County Judge has exceeded his jurisdiction; section 20, sub-sec. 1 b; section 20, sub-sec. 24. The notice is for more land than the defendants can under any circumstances take from the plaintiffs without their consent. The statute only permits a total width of 450 feet. The notice requires 797 feet: R. S. O. ch. 170, sec. 11.



Argument.

*Moss, Q. C., and Walter Macdonald, contra.* The company can take lands not shown on the plan under section 11 of the Act. There is a right of deviation within a mile under sub-section 11 of section 10 : *The Ontario and Quebec R. W. Co. v. Philbrick*, 5 O. R. 674 ; 12 S. C. R. 289. The County Judge having special jurisdiction in this case cannot be interfered with by injunction. The company in offering privileges as part of the compensation merely intended to give those privileges as extra for the sake of peace ; but the fact that they were offered does not embarrass the arbitrators, to be subsequently appointed to ascertain the compensation, as they are not bound in any way by the sum mentioned in the notice, and may disregard it.

*Shepley, Q.C.*, in reply referred to *Jenkins v. Central Ontario Co.*, 4 O. R. 593, on the question of jurisdiction.

August 25, 1891. STREET, J. :—

This is a motion to continue to the hearing an injunction granted by Ferguson, J., restraining the defendants from proceeding to take possession of certain lands under a warrant granted by the County Judge under sub-section 24 of section 20 of the Railway Act of Ontario, ch. 170, R. S. O.

The defendants are incorporated under ch. 82 of 52 Vict. (O.), and by section 23 of the Act of incorporation, all the provisions of the Railway Act of Ontario, save as varied by the special Act, are made applicable to the company. A plan has been filed as required by section 10 of the Railway Act ; no amended plans or plans of any deviations or alterations have been filed. The lands, proposed to be taken, do not correspond with the land shewn upon the statutory plan which has been filed ; they are part of the same lot, but they begin at a point some distance to the north of those shewn upon the plan ; there is a difference in the curve and in the point at which the line of the railway leaves the plaintiffs' premises. The difference appears to be of a substantial character in this respect,

that by the present location of the line, the plaintiffs are cut off, save by passing over the railway, from access to at least one highway, to which they would have had direct access under the location shewn upon the plan without being obliged to cross the railway. The main fact, however, appears to be that the location shewn in the plan which has been filed, does not cover the ground now proposed to be taken.

Judgment.

Street, J.

It is contended by the railway company that the Railway Act gives them powers of deviation sufficient to cover the variation between the plan which they have filed and the present location.

The special Act gives no powers of deviation which at all affect this question, and it must be determined by the provisions of the general Railway Act.

The provisions of the Ontario Railway Act upon this point, for the purposes of this case, are identical with those of the Dominion Railway Act, and in interpreting them, I have the advantage of the judgment of Mr. Justice Gwynne in *Murphy v. The Kingston and Pembroke R. W. Co.*, 17 S. C. R. 582, in which they are fully considered.

The conclusion at which he arrives is, that a railway company cannot compel a land-owner to convey any land, excepting such as has been designated and shewn upon a plan, either of the original location or of a deviation or alteration from it, within the limits of deviation allowed. So that, whenever the company having filed an original plan shewing the location of its line, desires to acquire land compulsorily for the purpose of an alteration from the original location, however small the deviation may be, a plan of the deviation must be filed under 51 Vic. ch. 29, sec. 130 (D.), or sub-section 7 of section 10 R. S. O. ch. 170. The mention of the approval of the legislature in the last mentioned sub-section, does not appear to require that every alteration, however slight, is to be approved by the legislature before taking effect, but merely operates to limit the right of deviation to such alterations as are

Judgment. within the powers of the company as approved by the  
Street, J. legislature.

The 11th sub-section of section 10, R. S. O., is one which merely restricts the right of deviation within certain limits, and does not enable the company to deviate without complying with the other sections of the Act requiring the filing of plans of the deviation. The clauses relating to deviations, are certainly remarkably badly drawn.

Applying these sections to the present case, with all the light thrown upon them by the decisions, it appears that the defendants are seeking to expropriate and to enter upon certain lands of the plaintiffs, other than those which their plan shews they intended to take according to the plan they have filed ; they are making a change in the location of their line of railway as they are empowered to do under sub-section 19 of section 9 of the Ontario Railway Act, but under the construction of the statute, which I adopt, they cannot require the landowners affected by the change to convey to them the property through which they now seek to pass, until they have filed a plan of the alteration, and sections 1, 2, and 3 of section 10 of the Railway Act have been complied with; and they are, therefore, not yet in a position to initiate any proceedings such as those upon which they rely.

Upon another ground, I think the defendants could not insist upon the warrant which they have obtained from the County Judge.

In the notice served by them upon the plaintiffs, they offer \$3,000, and certain crossings and station privileges as compensation for the land and the damages ; their surveyor certifies under sub-section 2 of section 20, that the sum offered by the defendants, is a fair compensation for the land and damages as mentioned in the notice. It must be assumed from the form of the notice, and of the surveyor's certificate referring to it, that the surveyor in estimating the sum to be offered the landowners, has taken into consideration the benefits which would accrue to them from the various crossings and privileges mentioned in the

notice ; and that leaving out these benefits, the sum certified would have been increased. It is obvious, however, from a perusal of these proposed benefits, that many of them are of a very uncertain character, and the land-owners might well say that they would rather have all their compensation in cash ; and the Act entitles them to it in that shape : sub-section 1 (b) of section 20.

There is, therefore, in my opinion, no proper notice, and no proper surveyor's certificate, and these are at the very foundation of the County Judge's authority in the matter.

The certificate is a part of the evidence which the statute requires him to look at and to have before him when acting under sub-section 24 of section 20, R. S. O.; for the sum for which the company is to give security under that sub-section, is to be not less than double the amount mentioned in the notice ; and the notice must be supported by the surveyor's certificate.

In my opinion, therefore, the County Judge acted here without jurisdiction : first, because the lands for the possession of which he issued his warrant, were not shewn as required by the company upon any plan filed under the statute ; and, second, because he had before him no proper notice and surveyor's certificate upon which he could act.

The defendants insist that the County Judge, being *persona designata* under the Act, has adjudicated upon the questions raised, and that the present motion for injunction is in effect an appeal from his decision ; that the proceedings before him should be brought up on *certiorari* and quashed, if there was no jurisdiction in him to make the order ; and that until quashed, they should be taken to be good.

It appears, however, to be necessary that a jurisdiction should be exercised by this Court to restrain railway companies from acting upon warrants such as that which they have here obtained, and not to leave persons affected by them to the tardier remedy afforded by *certiorari*, because otherwise the remedy would come in most cases too late to be of service.

Judgment.

Street, J.



Judgment.

Street, J.

In the case referred to of *Murphy v. The Kingston and Pembroke R. W. Co.*, 17 S. C. R. 582, the application was for an injunction to restrain the defendants, the railway company, from applying to the Judge for a warrant, and it was not suggested in reply that the matter must be left to him to dispose of, as the tribunal provided by the Act.

The defendants are justifying their right to the immediate possession of this land under a warrant, alleged to have been issued in pursuance of certain sections of the Railway Act. It is shewn that the foundation of the Judge's authority to issue such a warrant does not exist, and that he had no jurisdiction to enter upon the enquiry. I think I am at liberty to consider and act upon this evidence.

In the case of a limited jurisdiction, such as that of the Judge under the Act here, the facts which give jurisdiction and without which the powers given by the Act never arise, must not be absolutely presumed to exist because the Judge has acted as if they did; and if disputable then the warrant based upon them must stand or fall with them. See *Thomas v. Robinson*, 3 Wend. (N. Y.), 268, and the cases there referred to.

The order will be that the defendants be restrained until the hearing from acting upon the warrant and from proceeding under the present notice to expropriate the said lands. Costs reserved to be disposed of at the hearing.

G. A. B.

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## [QUEEN'S BENCH DIVISION.]

## RE COE V. COE.

*Prohibition—Division Court—Appeal to, from magistrates' order under 51 Vic. ch. 23 (O.)—Notice of appeal—"Cause or matter"—Amendment.*

By sec. 15 of R. S. O. ch. 139, which by sec. 11 of 51 Vic. ch. 23 (O.) is to regulate appeals to Division Courts from magistrates' orders for payment of maintenance moneys by husbands to wives, it is provided that the appellant shall give to the opposite party a notice in writing of his appeal, and of the cause or matter thereof, eight days, at least, before the holding of the Court at which the appeal is to be heard.

Where a notice of appeal was given in time, but did not state any "cause or matter" of the appeal:—

*Held*, on a motion for prohibition, that the Judge presiding at the Division Court had no power to allow the notice to be amended.

THIS was a motion by the plaintiff, the wife of Richard Coe, the defendant, for an order of prohibition to the junior Judge of the county of Bruce restraining him from hearing an appeal to a Division Court by the defendant from an order of certain justices of the peace, whereby the defendant was ordered to pay the plaintiff the sum of \$3 a week, under the provisions of 51 Vic. ch. 23, sec. 2, (O.), "The Married Women (Maintenance in Case of Desertion) Act." Statement.

By sec. 11, the practice in such cases as respects appeals is to be the same as under the "Act Respecting Master and Servant," R. S. O. ch. 139; and by sec. 15 of that Act it is provided that "The person proposing to appeal shall give to the opposite party a notice in writing of his appeal, and of the cause or matter thereof, within four days after such conviction, order, decision, or judgment, and eight days, at least, before the holding of the Court at which the appeal is to be heard \* \* \*."

The notice of appeal in this case was given on the 5th September, 1891, and the Court was held on the 19th September. The notice did not state any "cause or matter" of the appeal. When the appeal came on to be heard, the defendant applied to be allowed to amend the notice by stating the cause or matter, and the Judge gave leave to so amend; whereupon the plaintiff moved for prohibition, on

**Statement.** the grounds that no notice of appeal was served on the plaintiff, and that the Judge had no power to amend or allow the defendant to amend the notice.

The motion was argued before GALT, C. J., in Chambers, on the 10th October, 1891.

*E. A. Forster*, for the plaintiff.

*Douglas Armour*, for the defendant.

October 12, 1891. GALT, C. J.,—(after stating the facts as above)—

In the notice of appeal no cause or matter whatever was given. In my opinion, therefore, bearing in mind the statute is imperative that the notice of appeal *shall* contain the cause or matter, and be given at least eight days before the holding of the Court, the learned Judge was precluded from allowing the amendment.

Motion granted with costs to be paid by defendant.

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## [QUEEN'S BENCH DIVISION.]

## RE MCPHERSON V. MCPHEE.

*Prohibition—Division Court—Judge reserving judgment without naming day and hour—R. S. O. ch. 51, sec. 144—Prejudice—Waiver.*

THE defendant appealed from the order and decision of Statement. STREET, J., in Chambers, reported ante p. 280, in a note to *Re Tipling v. Cole*, ante p. 276, refusing prohibition to a Division Court.

The appeal was argued before the Divisional Court (ARMOUR, C. J., and FALCONBRIDGE, J.) on the 20th November, 1891.

*Matthew Wilkins*, for the defendant, relied on *Re Tipling v. Cole* as to the want of jurisdiction in the Division Court where the Judge does not name a day and hour for the delivery of judgment, pursuant to R. S. O. ch. 51, sec. 144, and upon *Re McGregor v. Norton*, 13 P. R. 223, as to waiver by moving before the Judge in the Division Court after the judgment. He produced the notice of motion served in the Division Court, and pointed out that it was not a motion for a new trial, but to set aside the judgment.

*Douglas Armour*, for the plaintiff, was not called upon.

The Court held that the defendant, by his application Judgment. on the merits to the Judge in the inferior Court, had waived his right to take the objection, pointing out that the purpose of sec. 144 was to give knowledge to the litigants that judgment had been given, which purpose had been completely answered here, and that the enactment, being as to procedure, could be waived, and clearly had been in this case.

*Appeal dismissed with costs.*

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## [CHANCERY DIVISION.]

## SWEETLAND V. NEVILLE.

*Husband and wife—Separate estate—R. S. O. ch. 132, secs. 3, 10, 13—  
Money in savings bank—Gift by husband—Fraction of day.*

Subsequently to the coming into force of the "Married Woman's Property Act," R. S. O. ch. 132, a married woman on the day of entering into a money bond deposited in her own name in a savings bank a sum of money, which the evidence showed had been given to her by her husband, but of which as against him, she had the absolute disposal by his consent and wish:—

*Held*, that this was sufficient on which to found a proprietary judgment against her, though it was not shewn that the bond was not executed at an earlier hour than that at which the money was deposited.

## Statement.

THIS was an action brought by John Sweetland, sheriff of the County of Carleton, against Cornelius Neville and Mary Neville, for damages for breach of a bond entered into by them with him, for delivery to him on demand, of certain goods and chattels which he seized under a writ of *fi. fa.* upon February 5th, 1891.

The action came on for trial at the Chancery Sittings at Ottawa, on October 27th, 1891, before BOYD, C., when the question arose, what, if any, separate estate the female defendant, who was the wife of the male defendant, had at the time of entering into the bond.

The evidence in reference to this matter is sufficiently set out in the judgment.

*G. F. Henderson*, for the plaintiff, referred to *Moore v. Jackson*, 20 O. R. 658.

*Lees*, Q. C. for the defendants. The money was only the wife's to be used as bestowments of the husband, and was not separate estate in any sense.

November 2nd, 1891. BOYD, C. :—

Judgment.

Boyd, C.

The inquiry is, what, if any, separate estate had Mrs. Neville on the 5th February, 1891, the date of the bond ? Her evidence is not clear or satisfactory as to the extent of her means at this date. I quote her evidence : " I had about \$500 in the Post Office Savings Bank before this of my own. I suppose I started it a year ago. It was before last New Year's. I have put in money since last New Year's. I had not \$400 there last New Year's. I don't think I had more than \$300 ; I had some money there. I had about \$200 on 5th February, 1891." Being directed to produce the bank book it appeared therefrom that the first deposit was \$110, made on 5th February, 1891. She then said : " I may have another savings bank book," and proceeded to give some confused explanation of the loss of one book, and the procuring of another.

To her own counsel she said : " I had no property independent of my husband. I get these moneys as private moneys of my own from my husband. I never had any separate means of my own apart from him."

The statute says, " every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary is shewn " : R. S. O. ch. 132, sec. 3, subsec. 3. The words " unless the contrary be shewn," are to be interpreted thus : " unless the separate property be of such a nature that the presumption cannot arise : " Per Vaughan Williams, J., in *Bonner v. Lyon*, 38 W. R. 541 (May, 1890). The question is one of fact to ascertain whether the separate property is such as she could and might reasonably have contracted credit upon. In *Bonner v. Lyon* it was held that personal jewels and apparel possessed this character ; here the property is money received from her husband, and deposited by her in the Post Office Savings Bank. The statute assists to a conclusion. This deposit is covered by section 10 of the Married Woman's Act, which provides that " all deposits," etc., after July 1st,

Judgment. 1884, made to stand, etc., in the sole name of any married woman, shall be deemed, unless and until the contrary be shewn, to be her separate property.

Boyd, C.

There is no evidence, in my opinion which goes to negative this presumption. I would infer from all the evidence, that as against her husband the wife had the absolute disposal of this money. Having it in her hands, she deposits in the public bank, one of the regulations of which (No. 9) provides that "deposits may be made by married women, and deposits so made will be repaid to any such women." I must take it also that this money was bestowed by the husband, and this instrument was made with his consent, with a view of totally divesting himself of any control or interest therein, because he has made an assignment of all his estate for the benefit of creditors, and no application has been made, *i. e.*, proved under sections 13 and 18 of the Act or otherwise, to shew that the money is not rightly lodged in her name, and subject to her sole control.

Putting the evidence at the worst, it is proved that the female defendant had \$110 deposited to her sole account on the day of the date of the bond. That is a substantial sum in respect of which she might have pledged her credit. This is not a case in which the Court should inquire into the fraction of a day. I have no evidence, as to the priority of hour on that day as between the deposit and the execution of the security. The general rule is that the law does not regard fractions of a day, though as put by Campbell, C. J., in *Queen v. Inhabitants of St. Mary Warwick*, 1 E. & Bl. at p. 827: "You must indeed regard the fraction in cases where you have to determine the rights of contending parties, each insisting on their portion of the time," but such is not the nicety in this contest. The broad question is whether the money received from the husband is sufficient to found the right to a proprietary judgment against the wife, and my judgment is that on the evidence of this case that is the sound conclusion.

Again, section 3 of R. S. O. 1887, ch. 132, enables a married woman to acquire and to hold personal property as her

separate property, as if she were a *feme sole*, without the intervention of any trustee. This is in terms wide enough to cover the case of gifts from husbands to wives, and that such is the meaning (in the absence of fraud as against creditors) becomes confirmed by the provisions in section 13 of the Act. That the moneys received by the wife were gifts from the husband is manifested by the manner of user on the part of the wife. *Primâ facie* the moneys etc., received and used were her separate estate so as to cast on the husband or on creditors the burden of disturbing the donation to her sole use. So that however viewed she appears to be competent to contract with reference to this property, and if so, then the Act attaches liability to this and all after acquired property of the same separate character (section 3, sub-sec 4). I give leave to amend by setting up the separate estate of the married woman, and award the usual judgment as against her estate with costs, less the costs of the unsuccessful application for speedy judgment at Toronto. As against the husband judgment for the \$302, interest and costs less as aforesaid.

I disposed of all the objections raised against the right of the sheriff to recover upon the argument. This is a case in which the Court should not be astute in defeating the claim of an officer of the Court who through kindness released goods seized, relying upon the *bonâ fides* of the execution debtor and his wife.

A. H. F. L.

Judgment.

Boyd, C.



## [CHANCERY DIVISION.]

## ROGERS v. THE ONTARIO BANK.

*Fixtures—Mortgagor and mortgagee—Fi. fa. goods—Interpleader.*

Certain machinery was placed *in situ* on land and housed with a view to the utilization of the land as a phosphate mine; and it was intended to utilize the machinery upon the land, moving it from place to place so long as veins could be found. The soil was excavated in order to form a bed for the boiler and hoist, and the machinery was firmly attached by bolts to sleepers or skids placed on the rock bottom of the excavation; and a house was erected over the machinery, to erect which the soil was also to some extent excavated. The boiler and machinery were also fastened to the building by rods inside underneath the floor, and the smoke stack was steadied by guys fastened to the ground and to stumps in the ground:—

*Held*, that the chattels in question were fixtures and could not be removed without the consent of the mortgagee.

*Semble*, that apart from this, it was impossible to sell these fixtures under an execution against goods so long as the physical attachment to the land existed, even if the owner of the equity of redemption had the right to detach and remove them as chattels.

## Statement.

THIS was an interpleader issue wherein David Rogers the claimant affirmed, and the Ontario Bank and other execution creditors denied, that certain property, being one boiler and connections and one steam hoist with ropes and connections attached, seized and taken in execution by the sheriff of the county of Frontenac, under writs of *feri facias* in his hands issued under judgments against the Frontenac Phosphate Company (limited), were at the time of the delivery of the writs subject to a mortgage held by the said Rogers as against the said execution creditors, under circumstances which appear sufficiently for the purpose of this report in the judgment of Boyd, C.

The action came on for trial at the Chancery sittings at Kingston, before Boyd, C., on September 14th, 1891.

*J. McIntyre*, Q.C., for the plaintiff. The cases conflict. The question turns upon the degree and object of the annexing to the soil. The intention governs: *Keefer v. Merrill*, 6 A. R. 121, 125, 137; *Holland v. Hodgson*, L. R.

Judgment.  
Boyd, C.

7 C. P. 328, 334; *Oates v. Cameron*, 7 U. C. R. 228; *Gooderham v. Denholm*, 18 U. C. R. 203; *McDonald v. Weeks*, 8 Gr. 297; *McCausland v. McCallum*, 3 O. R. 305; *Burke v. Taylor*, 46 U. C. R. 371; *London and Canadian Loan, etc., Co. v. Pulford*, 8 P. R. 150; *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382. If the machinery was placed there to develop the mine it became a fixture: *Patterson v. Johnson*, 20 Gr. 583. The boiler house was a fixture and on foundations, and a part of the land: *Phillips v. Grand River Farmers' Mutual Fire Ins. Co.*, 46 U. C. R. 334. This machinery was for mining purposes, and for better utilizing land, and so this is distinguished from other cases where the machinery was used for its own purposes: *Mather v. Fraser*, 2 K. & J. 536; *Fisher v. Dixon*, 12 Cl. & F. 312, 328; *Schreiber v. Malcolm*, 8 Gr. 433.

*Walkem*, Q.C., and *Rogers*, for the defendants. There was no expectation that this machinery would be brought upon the land. The mortgagee should not, as a matter of equity, get this additional security. The idea was to have the boiler so arranged that it could be moved from place to place, and there was no appropriation of it to any given locality: *Ward v. Countess of Dudley*, 57 L. T. 20; *Thomas v. Inglis*, 7 O. R. 588; *Wake v. Hall*, 8 App. Cas. 195.

*McIntyre*, in reply. *Ward v. Dudley*, 51 L. T. 20, depends upon the construction of the special Act there. There is a difference between the case of a tenant for life and of the owner of the fee. I refer to *Climie v. Wood*, L. R. 3 Ex. 257; *Cross v. Barnes*, 36 L. T. N. S. 683; *Walmsley v. Milne*, 6 Jur. S. 125; *Elwes v. Maw*, Smith L. C., 9th Am. ed., p. 423; *Harris v. Malloch*, 21 U. C. R. 82; *Grant v. Wilson*, 17 U. C. R. 144.

September 17th, 1891. BOYD, C.:—

Between mortgagor and mortgagee everything on the land fixed to the land passes under a mortgage of the freehold, so that it cannot be sold and removed as a chattel to the prejudice of the mortgagee. This rule also obtains as

Judgment.  
Boyd, C.

to property attached to the freehold by the mortgagor or his assignee after the date of the mortgage, unless contrary stipulations be made with the mortgagee. So far then in this case as the relation of the parties is concerned the rule applies that the machinery and buildings erected by the purchaser of the equity of redemption would, if fixtures, pass under the mortgage. The issue was mainly argued on the character of the things and the manner of their annexation.

In *Wake v. Hall*, 8 App. Cas. at p. 204, Lord Blackburn says: "Whenever the chattels have been annexed to the land for the purpose of the better enjoying the land itself, the intention must clearly be presumed to be to annex the property in the chattels to the property in the lands; but the nature of the annexation may be such as to shew that the intention was to annex them only temporarily."

This same Judge, in his earlier judicial career, explains the meaning to be attributed to this temporary annexation in *Holland v. Hodgson*, L. R. 7 C. P., at p. 337. It would be quite inapplicable to the case of machinery employed to work a mine, and intended to be used while the mine lasted.

Such is the case now in judgment: the machinery was brought upon the land, placed *in situ* and housed in, with a view to the utilization of the land as a phosphate-yielding property. No merely temporary purpose was contemplated: so long as veins could be found the machinery was intended to remove the phosphate, and thereby affect and diminish in bulk and in worth the security of the mortgagee. The purpose, as admitted by the president of the company, was to move this machinery from place to place over the lot, till the material was exhausted or ceased to be got in paying quantities: that is, the value which the property, as a phosphate mine, possessed was to be abstracted by means of the machinery, and the mortgagee to be left with the comparatively worthless residue of land or rock; and, having exhausted the property, the company was to be at liberty to remove their

machinery to another site. Giving full credit to this evidence, it does not help the case of the execution creditors if, in fact, the subject-matter of this issue was attached to the land. The fact of such attachment, I think, is well proved. The soil was excavated, in order to form a firm bed for the boiler and hoist; upon a rock bottom, reached by excavation, sleepers or skids were placed to which the machinery was firmly attached by bolts and screws; over all a house was placed, to erect which the soil was also to some extent excavated; this building was not merely a cover for the machinery, but was also used for general purposes as a workshop; through the roof a smoke stack, part of the boiler and engine, projected, and this was steadied by guys fastened to the ground and to stumps rooted in the ground; the boiler was also fastened to this building by rods inside and underneath the floor, as described in the evidence.

Judgment.

Boyd, C.

This cardinal fact of annexation to the soil being found, all the rest is easy, having regard to the decision of Manisty, J., in *Cross v. Barnes*, 36 L. T. N. S. 693 (1877). The things in question there were an engine and boiler, known as portable engines, commonly used without being fixed to the land: they were only fixed for the purpose of steadying them when in use, and they were only intended to be used for an alleged temporary purpose, namely, sinking a pit in a colliery. The Judge said: "I do not think it matters (as between mortgagor and mortgagee) by what name a chattel is called, or for what purpose or for what length of time it is intended to be used, provided it be fixed to the realty and the purpose and the time for which it is intended to be used be of a quasi-permanent character. Neither do I think it matters by what means a chattel is fixed." In the result the engine and boiler were declared to pass as fixtures to the mortgagee, though put in after the mortgage.

Another decision much in point is *Turner v. Cameron*, L. R. 5 Q. B. 306, as to the mode of annexation to the soil and the shifting user of the tramways there in question. See fuller report in 18 W. R. 544.



Judgment.

Boyd, C.

The matter before me may perhaps be rested upon a narrower ground than this, namely, that there being annexation *de facto* to the land, it was impossible to sell these fixtures under an execution against goods, so long as that physical attachment existed. Even if the owner of the equity of redemption had the right to detach and remove as chattels, that could not give the right under *fi. fa.* goods to enter on the lands, break down the side of the house or otherwise remove it, so as to expose the machinery, and then to sever the machinery from the soil, so, in effect, committing waste against the remonstrance of the mortgagee: *Ex parte Belcher*, 4 Dea. & Ch. 703; *Bain v. Durand*, 1 App. Cas. at p. 772, per Lord Chelmsford, and *Whitehead v. Bennett*, 27 L. J. N. S. Ch. 474, approved by Lord Selborne in *Wake v. Hall*, 7 Q. B. D. at p. 301.

My conclusion is that the finding should be in favour of the mortgagee.

A. H. F. L.

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## [QUEEN'S BENCH DIVISION.]

## THOMPSON V. CLARKSON.

*Assignments and preferences—Inspector of insolvent estate—Purchaser of estate from assignee—R. S. O. ch. 124.*

An inspector of an insolvent estate, appointed by the creditors under R. S. O. ch. 124, who acts towards the assignee in an advisory capacity, cannot become a purchaser of the estate at a private sale thereof.

*Semble*, per ARMOUR, C. J., that a private sale by an assignee to any creditor, without the consent of the others, would also be open to objection.

THIS action was brought by George F. Thompson, for Statement. himself and all other creditors of M. Isbester & Co., against E. R. C. Clarkson, Samuel W. Ray, and Mary Street. The defendant Clarkson was the assignee for the benefit of the creditors of M. Isbester & Co., under R. S. O. ch. 124; the defendant Ray was a creditor of the insolvent estate of M. Isbester & Co., and one of the inspectors of the estate appointed by the general body of the creditors, and the defendant Street was the partner of the defendant Ray in the firm of Ray, Street, & Co.

The statement of claim alleged that the book debts, stock-in-trade, etc. of the insolvent firm was sold by the defendant Clarkson *en bloc* to the defendants Ray and Street by private sale, through one Fraser, an agent of these defendants, and prayed that the sale might be set aside as fraudulent, improvident, and void.

The action was tried without a jury at Port Arthur at the Summer Sittings in 1891, before MACMAHON, J.

It appeared from the evidence that the defendant Clarkson, the assignee, was not made aware of the defendant Ray's interest in the purchase by Fraser, and supposed that the latter was buying for himself; also that the defendant Ray, without disclosing his interest, had advised the assignee in regard to the offer to purchase made by

Statement. Fraser, before it was accepted, and had recommended its acceptance.

MACMAHON, J., found that the defendant Ray, being one of the inspectors of the insolvent estate, could not become a purchaser of such estate from the assignee thereof, and adjudged that the sale should be set aside. He reserved judgment as to the proper directions to give; and on the 27th August, 1891, he gave judgment directing a reference to a Master to inquire and report as to the amount and kind of stock sold by the defendants Ray and Street, the profit made by them on such sales, the value of the stock still in their hands, the amount of the book debts collected by them, and the real value of the whole estate at the time of the purchase by them; reserving further directions.

The defendants Ray and Street appealed from the judgment of MACMAHON, J., and their appeal was argued before the Divisional Court (ARMOUR, C. J., and STREET, J.), on the 20th November, 1891.

*Delamere*, Q.C., for the appellants. The only question I raise is whether an inspector of an insolvent estate can become a purchaser of it. No duties are laid upon inspectors by the Assignments and Preferences Act, R. S. O. ch. 124, such as were imposed by the Insolvent Act. If inspectors are trustees, there is an end of the question; but I submit they are not. The assignee is a trustee, but not the inspectors. There is no reason why an inspector should not purchase. The resolution passed at a meeting of creditors simply appointed Ray and others inspectors and nothing more; it laid no duties upon them. An inspector is just one of the creditors, nothing more, and there is no reason why a creditor should not purchase.

*Watson*, Q.C., for the plaintiff. In R. S. O. ch. 124, inspectors are referred to, in sec. 11, as the persons to fix the remuneration of the assignee in case of the creditors failing to provide therefor; again in sec. 16, which provides for the calling of a meeting of creditors for the appoint-

ing of inspectors and the giving of directions with refer- Argument.  
ence to the disposal of the estate; and again in sec. 21,  
which provides that the assignee shall declare dividends  
whenever he is required by the inspectors. These refer-  
ences shew that a control of the assignee by the inspectors  
is contemplated; that the assignee is put under the  
direction of the inspectors as an advisory board. It is  
clear from the evidence of the defendant Ray himself that  
he acted in an advisory capacity, and advised the assignee  
to accept Fraser's offer. I don't want to stand or fall  
by the position of Ray as a mere creditor. I contend  
that as inspector he was more than a mere creditor, and  
in the position of a trustee. Under the English Bankruptcy  
Acts, a committee of inspection is appointed, and the  
members of it cannot purchase any part of the estate:  
Smith's Mercantile Law, pp. 759, 760; *Chaplin v. Young*,  
33 Beav. 330. By the Dominion Insolvent Act of 1875,  
38 Vic. ch. 16, sec. 35, it was expressly provided that no  
inspector of any insolvent estate should purchase any part  
of the stock-in-trade, etc. See the amending Act, 39 Vic.  
ch. 30, sec. 8.

*George Bell*, for the defendant Clarkson. My client's  
position is that he was not aware that Ray was the real  
purchaser, and there is no evidence that he was.

At the conclusion of the argument the judgment of the  
Court was given by

ARMOUR, C. J. :—

We think it is clear that the sale cannot be upheld.  
The motion must be dismissed with costs. I should think,  
speaking for myself, that a private sale by an assignee to  
any creditor, without the consent of the other creditors, ??  
would also be open to objection.

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## [QUEEN'S BENCH DIVISION.]

## RE LILLEY AND ALLIN.

*Mandamus—Revising officer—Electoral Franchise Act, R. S. C. ch. 5, secs. 19, 33—Notice of objection to names on voters' list—Grounds of objection—"Not qualified"—Validity of notice—Ruling of revising officer upon—Appeal to County Judge.*

A notice under sec. 19 of the Electoral Franchise Act, R. S. C. ch. 5, as amended by 52 Vic. ch. 9, sec. 4, to a person whose name was objected to, for the purpose of having the name taken off the voters' list at the final revision, simply gave "not qualified" as the ground of objection:—*Held*, sufficient.

The revising officer (who was not a Judge) having ruled that the notice was valid, the person whose name was objected to appealed from that ruling to the County Judge, who held that the notice was invalid, and the revising officer thereupon refused to go on and hear the complaint:—*Held*, that no appeal was given by sec. 33 of the Act from the revising officer's ruling; and therefore the proceedings before the County Judge were *coram non judice*.

A mandamus was granted.

## Statement.

AN application by Frank Walder Lilley, an elector upon the list of voters for 1891, as preliminarily revised, under the Dominion Electoral Franchise Act and amending Acts, for the electoral district of the city of London, for an order of mandamus commanding James Harshaw Fraser, revising officer for the city of London, to proceed with, entertain, try, and dispose of the objections of the applicant to the names of Lewis Allin and other persons upon the list of voters, as preliminarily revised, for the first polling sub-division of such electoral district, at the Court for the final revision of the list of voters.

The revising officer having duly appointed the 10th November, 1891, as the day for holding his Court for the final revision of the list, the applicant on the 26th October, 1891, deposited with the revising officer notice in writing of his objections to the names of Allin and others, and on the same day sent notices by post, registered, addressed to Allin and others, in which he stated that he would apply to have the list of voters for polling district number 1 for the year 1891, as preliminarily revised, amended by removing therefrom the names of Allin and the others,

“for the grounds hereinafter stated.” \* \* \* “Grounds Statement for amendment—not qualified.”

At the Court held by the revising officer on the 10th November, 1891, counsel for Allin objected that the notice given by the applicant was invalid, null, and void, because it did not set out any ground of objection as prescribed by the Act and amendments.

The revising officer ruled that the notice was a notice within the Act and not invalid, but that it was defective and did not sufficiently state the grounds of objection to the voter's name; and, on the application of counsel for Lilley, counsel for Allin objecting that he had no power or jurisdiction so to do, he allowed an amendment of the notice, and directed the same to be amended by stating therein the grounds of objection, and ordered particulars to be given by filing them, in the form prescribed by the Act, with the revising officer, and mailing a copy to the person objected to not later than Friday the 13th November, 1891; and he postponed the hearing of the objections until the 27th November, 1891.

Lewis Allin, on his own behalf and on behalf of all other persons affected, appealed under sec. 33 of R. S. C. ch. 5 to the Judge of the County Court of the county of Middlesex (the revising officer not being himself a Judge), from the decision and ruling of the revising officer holding the notice valid, and, in case it should be held that the notice was valid, appealed also from the decision and ruling of the revising officer that the notice might be amended, and from the direction that particulars should be given and the hearing of the complaint adjourned.

The appeal was heard by Elliot, Co. J., on the 20th November, 1891, counsel for Lilley objecting that there could be no appeal to the Judge under the Act or otherwise.

The learned Judge, after hearing the appeal, on the same day gave his opinion in writing as follows (after setting out the facts):

Statement.

“ I think the notice was invalid under the Act. I do not enter into an academic discussion as to whether it was null and void. I think all that I am required to do is to determine whether it was a valid or invalid notice, and I say it was invalid, and my reason for thus deciding is that no grounds are stated why the man's name should be removed, and thus it is invalid under the Act. So far as the rest of the appeal is presented for my consideration, I am of opinion that under the 33rd section my power is confined to the action of the revising officer in dealing with the list; that is to say, as to the proper admission of names or the exclusion of them, being as to something which is or should be in the list or which ought not to be in it. It is not said that there is an appeal to the County Judge as to the *proceedings* of the revising officer, which would be a comprehensive term such as is used in sec. 26. I consider that I have no authority to interfere with the action of the revising officer in amending or in adjourning the Court to a future time. Whatever may be the importance of my ruling as to the question whether the notice in question is insufficient or invalid, and null and void, as I am pressed to decide, I do so, and rule, as I have said, that it is invalid under the Act, and so far the appeal is sustained, but in respect to my authority to interfere with the revising officer's power to order amendment or to adjourn the Court, I do not entertain the appeal. Mr. Magee urges that I have no jurisdiction to hear the appeal or any portion of it.”

In consequence of this decision of the County Judge, the revising officer refused to proceed with the trial or hearing of the objections on the 27th November, 1891, and on the 21st November, 1891, made known his refusal to the respective counsel for Lilley and Allin.

Lilley thereupon moved for an order of mandamus as above, and his motion came on to be heard on the 25th November, 1891, in Chambers, before ARMOUR, C. J., who

adjourned it into the Queen's Bench Divisional Court, and <sup>Argument.</sup> it was there heard on the same day before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.

*Aylesworth*, Q. C., for the applicant. The notice alleges "not qualified" as the ground for amendment of the list. This is a sufficient notice, and there is no defect in it. See the model in the statute itself, form D in the schedule to R. S. C. ch. 5. It is intended that in the revising officer's Court, as in the Division Court, strict forms of procedure and rules of evidence are to be relaxed. See 53 Vic. ch. 8, sec. 4 (D). Sec. 19 of R. S. C. ch. 5 (as amended by 52 Vic. ch. 9, sec. 4),\* requires the notification to be made in the form D given in the schedule; and sec. 20 prescribes the duty of the revising officer which we seek to have enforced here, viz., to "hear and dispose of any objection or complaint and any application to add to, amend, or correct the said list, of which notice has been given as aforesaid." The amendment and adjournment directed by the revising officer were not the subject of appeal. The officer's powers of amendment under sec. 26 are ample.

\* Sec. 19, sub-sec. 2, of "The Electoral Franchise Act," R. S. C. ch. 5, as amended by 52 Vic. ch. 9, sec. 4, is as follows :

"Any person desiring to object to or add to, or in any way to amend or correct, the original list, or either of the supplementary lists, on the final revision, shall have the right so to object or to apply for the said addition, amendment, or correction to the revising officer, if he has, at least two weeks before the day fixed for such final revision, deposited with or mailed to the revising officer, by registered letter, at his office or place of address, a notice in the form D in the schedule to this Act; and in the event of any person desiring to object to any name on the original list or on the supplementary list containing the names proposed to be added, the person so objecting shall also give notice in writing at least two weeks before the day fixed for such final revision to the person whose name is objected to, and in the like form as to the revising officer, by delivering such notice to such person, or by mailing the same by registered letter to the post office address given in the list or to his last known post office address."

In form D the direction is "to state the name or names objected to, with the grounds therefor."



Argument.

The right of appeal conferred by sec. 33\* does not apply to mere procedure such as the exercise of the power to amend or adjourn. What is intended by section 33 is evidently an appeal from a final decision in respect of an objection, complaint, or application; and this appears, not only from the language of the section itself, but from sec. 50, sub-sec. 2, of "The Elections' Act," R. S. C. ch. 8. There is but one appeal under sec. 33, and that is evidently not an appeal on preliminary objections, but on the final decision of the objections to the list. What took place before the County Judge was, therefore, *coram non judice*; the revising officer was not in any way bound by the Judge's opinion; and his subsequent decision against the applicant's right to have his objections heard should be controlled by mandamus. Upon the right to mandamus in such a case, I refer to *Re Simmons and Dalton*, 12 O. R. 505.

*Gibbons*, Q. C., on the same side. The County Judge decided that the notice was invalid, but did not entertain the appeal from the ruling of the revising officer as to amendment and adjournment. He allowed the appeal as far as he could. "Not qualified" is a statement of a ground of objection. If any ground is given, the notice is valid. [He was stopped by the Court.]

*Hellmuth*, for Lewis Allin. Every name on the list, as preliminarily revised, is entitled to remain there unless a good objection is made. The notice should have alleged some such grounds as appear in the schedule to R. S. O.

\* 33. In any case in which the revising officer is not also a Judge of a Court, as hereinbefore mentioned, any person who, under the foregoing provisions of this Act, has made any objection, complaint, or application in respect of the list of voters for any polling district, or any person with reference to whom such objection, complaint, or application has been made, who is dissatisfied with the decision of such revising officer in respect thereof, may give to the said revising officer or to his clerk, on the day of such decision, or within seven days thereafter, notice in writing of his intention to appeal. \* \*

34. Such appeal shall be in \* \* Ontario \* \* to the Judge of the County Court of the county or union of counties in which the polling district, in respect of which such appeal arises, is situate.

ch. 9, *e.g.*, "not the owner of lot 7." [ARMOUR, C. J.—By Argument. the Common Law Procedure Act the grounds were required to be stated in a rule *nisi* for a new trial, but in *Cameron v. Milloy*, 14 C. P. 340, "contrary to law and evidence" was held sufficient. Suppose it were the other case, of a voter applying to have his name added to the list, would it not be a monstrous thing that he should be deprived of the franchise upon a special demurrer of this kind?] But it is not the same where the application is to strike a name off the preliminary list. It must be assumed that a name is properly there till the contrary be shewn by a strict compliance with the statute. The applicant's right here is not the same kind of a right as the voter's right to be on the list. In this case it is just as if there had been no notice at all to the voter, and Lilley had made his objection orally at the Court for the final revision. The notice is insufficient and invalid: *Re Simpson and County Judge of Lanark*, 9 P. R. 358; *Bridges v. Miller*, 20 Q. B. D. 287; *Hartley v. Halse*, 22 Q. B. D. 200; *Re Coe v. Coe*, ante, p. 409; *Furlong v. Reid*, 12 P. R. 201; *Pfeiffer v. Midland R. W. Co.*, 18 Q. B. D. 243. If the notice was not a valid notice, the revising officer could not amend it. His powers are strictly statutory; he has no inherent powers of amendment. If a notice was not given, he had no power at all: R. S. C. ch. 5, sec. 20. [ARMOUR, C. J.—We are all of opinion that the notice was perfectly valid.] Even if the notice be valid, this Court will not grant extraordinary relief by mandamus where there is another remedy. There is a remedy by appeal to the County Judge under sec. 33. The revising officer's first decision that this notice was valid was a final decision of that point. It is clear under *Re Simpson and County Judge of Lanark*, 9 P. R. 358, that the revising officer had jurisdiction to try the validity or invalidity of the notice. If he were a County Judge, the only possible way to obtain relief against his decision would be by mandamus, as decided by Proudfoot, J., in *Re Simmons and Dalton*, 12 O. R. 505, but as he is not a County Judge, there is an appellate Court to rehear his

Argument.

decision, and no further appeal. This Court if it grants a mandamus is rehearing the appeal to the County Judge.

*C. J. Holman*, for the revising officer, submitted to whatever order the Court might make.

*Aylesworth*, in reply. Plainly it is only from a final decision that an appeal lies. Sec. 30 shews that as well as sec. 33. If there is no appeal except from a final decision upon the merits, the proceedings before the County Judge were purely illusory. There is a distinction between this case and *Re Marter and Gravenhurst*, 18 O. R. 243. The Ontario Act, under which that case was decided, provides for an appeal, not only against a decision of the Court of Revision on an appeal to that Court, but also against the omission, neglect, or refusal of that Court to hear or decide an appeal. See judgment of Street, J., at p. 255. In the Act now in question no provision is made for the County Judge sending back the case to the revising officer, or for hearing the complaint himself, and this is conclusive to shew that no appeal was intended to be given against an omission to hear a complaint.

*Hellmuth* asked leave to refer to *Regina v. Kesteven*, 3 Q. B. 810.

Judgment was given the same day.

THE COURT held :—

1. That the notice was sufficient.
2. That no appeal is given by the Act to the County Judge from the revising officer's decision that the notice was valid; and therefore that the proceedings before the County Judge were *coram non judice*.

*Mandamus order granted. No costs.*

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## [QUEEN'S BENCH DIVISION.]

## DAVIES ET AL. V. GILLARD ET AL.

*Assignments and preferences—R. S. O. ch. 124, sec. 2—Chattel mortgage to creditor by insolvent debtor over all his property—Pressure—Collusion.*

In an action to have a chattel mortgage made by a debtor to certain creditors declared fraudulent and void as against other creditors, it was found at the trial that at and before the time of the execution of the mortgage the debtor was in insolvent circumstances and unable to pay his debts in full, as he well knew; that the mortgagees were well aware of the fact and took the mortgage with full knowledge of it; that their object in taking the mortgage was to obtain security for their debt; that the necessary effect was to defeat, delay, and prejudice the creditors of the mortgagor, and to give the mortgagees a preference over the other creditors; and that the mortgagees at and before the execution of the mortgage knew that it would have such effect. It also appeared that the property covered by the chattel mortgage was all that the debtor had, and that he knew that he had many creditors who could not be paid.

*Held, per ARMOUR, C. J., at the trial, following Molson's Bank v. Halter, 18 S. C. R. 88, that the mortgage was not assailable under R. S. O. ch. 124, sec. 2, notwithstanding the findings of fact, because the mortgagees had requested the debtor to give them the security.*

The judgment was reversed in the Divisional Court.

*Per FALCONBRIDGE, J.—It follows from the findings of fact that the pressure was merely a sham pressure—a piece of collusion.*

*Per STREET, J.—There was bona fide pressure, but the doctrine of pressure does not apply where the debtor has transferred the whole of his property.*

THIS action was brought to have a certain chattel mortgage, made by the defendant McKellar to his co-defendants Gillard & Co., on the 11th March, 1891, declared fraudulent and void as against the plaintiffs and all other creditors of the defendant McKellar except the defendants Gillard & Co. The facts appear in the judgment of STREET, J.

The action was tried without a jury at Hamilton in the spring of 1891, before ARMOUR, C. J., who afterwards gave judgment as follows:—

April 28, 1891. ARMOUR, C. J.:—

The decisions in *Johnson v. Hope*, 17 A. R. 10, and *Gibbons v. McDonald*, 18 A. R. 159, in the Court of Appeal, and *Molson's Bank v. Halter*, 18 S. C. R. 88, in the



Judgment. Supreme Court, as I understand them and their logical results, have effectually repealed the Act R. S. O. ch. 124, sec. 2, except as to cases which have never yet arisen in this Province, and are never likely to arise. These decisions bind me and I bow to them, and under these decisions the chattel mortgage in question is unassailable.

Armour, C.J.

In case, however, it may be thought to be assailable, I make the following findings of fact. I find that at and before the execution of the said chattel mortgage, the mortgagor therein named was in insolvent circumstances and was unable to pay his debts in full, as he well knew; and I find that at and before the time of the execution of the said chattel mortgage, the mortgagees therein named were well aware of the fact that the mortgagor therein named was in insolvent circumstances and was unable to pay his debts in full, and took the said chattel mortgage with full knowledge of that fact; and I find that the object of the mortgagees in taking the said mortgage was to obtain security for the money thereby secured; and I find that the necessary effect of the said mortgagees' taking the said chattel mortgage was to defeat, delay, and prejudice the creditors of the mortgagor therein named, and to give them, the mortgagees, a preference over the other creditors of the mortgagor; and I find that the said mortgagees at and before they took the said chattel mortgage knew that it would have such effect.

The plaintiffs appealed, and their appeal was heard before the Divisional Court (FALCONBRIDGE and STREET, JJ.), on the 27th May, 1891.

*W. Cassels*, Q. C., and *J. W. Curry*, for the plaintiffs. The findings of fact carry the case further than any of the cases referred to by the learned Chief Justice. In this case there was no honest pressure in law; it was a mere sham. We refer to *Ivey v. Knox*, 8 O. R. 635; *Long v. Hancock*, 7 O. R. 154; 12 A. R. 137; *Ex p. Hall*, 19 Ch. D. 580; *Ex p. Griffith*, 23 Ch. D. at p. 72; *Ex p. Hill*, *ib.*

695. The findings shew collusion, a guilty knowledge, Argument. and a preference in fact.

*W. F. Walker*, Q. C., for the defendants Gillard & Co. In order to arrive at the conclusion he did, the learned Chief Justice must, in effect, have found that there was *bonâ fide* pressure. I ask your lordships to reverse the finding of fact that these defendants knew McKellar was insolvent when they took the mortgage, as not warranted by the evidence. As to pressure I refer to *Davidson v. Ross*, 24 Gr. 22, at pp. 64, 83, and to an article in the *Canadian Law Times*, vol. 11, p. 61, especially at p. 73, where an unreported case of *Robertson v. Bristol* is referred to.

*Cassels*, in reply. No motion has been made by the defendants Gillard & Co. against the findings of fact, and even if it was open to the defendants to impugn them, the Court would not interfere with those findings.

November 16, 1891. STREET, J.:—

The plaintiffs in this action seek to set aside the transfer from the debtor McKellar to the defendants of his stock-in-trade upon two grounds ; the first being that the chattel mortgage by which this transfer is effected is void as a preference ; and the second that it is void as having been made with intent to defeat and delay creditors.

It appeared at the trial that in March, 1890, about a year before the transaction which is impeached, the debtor had obtained an extension of time from his creditors, and to secure them had transferred to a trustee his real estate and his book debts, the real estate being already at that time subject to a mortgage. On 3rd March, 1891, he transferred his equity of redemption in the real estate and book debts to the defendants and another creditor as security for their debts. On the 7th March, 1891, an agent for other creditors went up to Glencoe, where the debtor carried on business, and ascertained that he was undoubtedly insolvent. The debtor then promised to go to Hamilton

Judgment.  
Street, J.

on the 9th March, to make an assignment for the general benefit of his creditors. On 9th March one of the defendants' firm went to Glencoe and pressed for a chattel mortgage upon the only remaining asset, namely, the stock-in-trade, which was valued at about \$1,350, and he states that the debtor then promised to come to Hamilton on the 11th March, and give it to him. The defendants' unsecured debt was \$2,800. The security, so called, obtained on the 3rd March, 1890, was apparently worthless, and the stock-in-trade was not nearly sufficient security, but it was all that the debtor had to give.

On the 11th March, 1891, the debtor went to Hamilton and attended a meeting of creditors, at which the defendants were not present. A statement of his affairs was made out, shewing him to be hopelessly insolvent, and he appears to have assented to the suggestion that he should make an assignment for the general benefit of his creditors. The meeting then adjourned for a short time in order that the assignment might be prepared. During the adjournment the debtor executed the chattel mortgage to the defendants which is now impeached, covering all his stock-in-trade, shop furniture, machines, and utensils, to secure \$2,805.20 due the defendants, payable on demand. Then he went back to the creditors' meeting, accompanied by Mr. Kitson, one of the defendants' firm. The debtor was asked to execute the assignment, whereupon Mr. Kitson objected to his doing so upon the ground that there was nothing to assign, and he then stated that his chattel mortgage just taken covered the stock-in-trade, and that the debtor's equity of redemption in his property was worthless. No assignment was executed, and the plaintiffs brought this action on behalf of themselves and all other creditors to set aside the chattel mortgage of the stock-in-trade, etc.

If the validity of the chattel mortgage were to depend merely upon the question as to whether the transfer effected by it were or were not made under pressure, I think we should be compelled by the authorities to agree

in the conclusion of the learned Chief Justice, and to uphold it as being good. We have by a long series of decisions imported this doctrine of pressure from the English law into our own, and it is impossible to disregard it. I think it would be impossible to hold in the present case that the transfer to the defendants was made by the debtor *ex mero motu*; there is evidence of what was not unnatural, perhaps, under the circumstances, viz., a strong effort on the part of the defendants, continued down to the last moment and then successful, to obtain for themselves all the security they could from their insolvent debtor without any regard to what might befall the other creditors. Under these circumstances I should feel bound to find that the transfer impeached was made under the influence of the request of the defendants, and was not the mere voluntary act of the debtor.

Judgment.  
Street, J.

Then it has been settled in the Exchequer Chamber by *Brown v. Kempton*, 19 L. J. C. P. 169, that the intent to give a preference by the conveyance of a portion of the debtor's effects must, in order to invalidate the transfer, be the sole motive with which it is made, so that if the transfer be found to be the result of mixed motives, one of them only being the intention to prefer, it must be held good. The authority of this case and of those depending upon it has, perhaps, been shaken to some extent by the dicta of the Lords Justices in *Ex p. Hill*, 23 Ch. D. 695, and in *Ex p. Taylor*, 18 Q. B. D. 295, but in neither of these cases was it necessary upon the facts as found by the members of the Court to come into conflict with *Brown v. Kempton*. The doctrine of pressure, and the dogma that no preference can be treated as fraudulent unless made by the debtor *ex mero motu*, have been carried by the cases to their legitimate conclusion, that a mere request by the creditor, if acted upon by the debtor, is sufficient to take away from a preference any fraudulent character, and this without regard to the condition, however desperate, of the affairs of the debtor at the time, or to the knowledge of the creditor of the state of the debtor's



Judgment. Street, J. affairs; the principle being that so long as a debtor retain his property he may prefer one creditor to another by transferring a portion of it to him, provided he do not do so fraudulently, *i. e.*, of his own mere motion with intent to prefer : *Johnson v. Fesenmeyer*, 25 Beav. 88, 3 DeG. & J. 13 ; *Davison v. Robinson*, 3 Jur. N. S. 791 ; *Davidson v. Ross*, 24 Gr. at pp. 64 and 83 *et seq.* ; *Ex p. Topham*, L. R. 8 Ch. 614 ; *Slater v. Oliver*, 7 O. R. 158 ; *Tomkins v. Saffery*, 3 App. Cas. 213 ; *Long v. Hancock*, 12 S. C. R. 532 ; *Molson's Bank v. Halter*, 18 S. C. R. 88.

The cases relied upon by the plaintiffs as shewing that the doctrine of pressure could not be applied where the debtor was on the eve of insolvency, do not appear, when examined, to establish any such principle. In all of them it was found as a fact in one way or another that the pressure was a mere sham, and was not acted upon by the debtor : *Ex p. Hall*, 19 Ch. D. 580 ; *Ex p. Griffith*, 23 Ch. D. 69 ; *Ex p. Hill*, 23 Ch. D. 695 ; *Ivey v. Knox*, 8 O. R. 635 ; *Long v. Hancock*, 7 O. R. 154.

In the present case, however, the property which the debtor transferred to his creditor was all that he had left, and he knew that he had many creditors who could not be paid. We have to consider whether the question of pressure can be taken into account under such circumstances.

In England it is clear that a transfer such as the present, covering the whole of the debtor's effects, without any present equivalent or substantial consideration, would be treated as a fraudulent assignment, and therefore as an act of bankruptcy, whether made under pressure or not. The distinction taken between the effect of a conveyance of part and of the whole of a debtor's property seems to have been this : where he retained a substantial portion of his effects after making the conveyance complained of, no absolute presumption could be raised against him that he did not intend to pay all his creditors out of the profits of what he retained ; but where he retained nothing he must be taken to have made the conveyance with the necessary

intention of defeating and delaying his other creditors, for no other result could follow from his action. See the judgment of Jervis, C. J., in *Graham v. Chapman*, 21 L. J. C. P. 173. See also *Wilson v. Day*, 2 Burr. 827; *Newton v. Chantler*, 7 East 138; *Siebert v. Spooner*, 1 M. & W. 714; *Woodhouse v. Murray*, L. R. 2 Q. B. 634; *Philps v. Hornstedt*, 1 Ex. D. 62.

Judgment.  
Street, J.

These cases, it is true, are all cases under the Bankruptcy Act, but the principle upon which a conveyance of all a debtor's property to one creditor, without any equivalent, is treated as an act of bankruptcy, is that he must be taken to have intended that which is the necessary consequence of his act; and inasmuch as the necessary consequence of such a conveyance must be to defeat and delay his other creditors, the conveyance must be taken to have been made with that fraudulent intent, and is therefore a fraudulent transfer, and as such an act of bankruptcy.

Under our law a conveyance made with intent to give to one creditor a preference over the others is fraudulent; a conveyance made in Ontario by a debtor whereby he strips himself of everything in favour of one creditor, who gives him no present equivalent, has the same necessary result as in England, viz., to prevent the other creditors from recovering any portion of their claims, and must equally here as there be taken to be made with the intent that that result shall follow. So that I can see no reason why, although we have no bankruptcy legislation here, we should not adopt and apply the line of decisions to which I have referred; nor why, having adopted from the English law, and followed to the farthest point to which its authors carried it, the unsatisfactory and artificial doctrine that pressure is the only proper test of a debtor's intention where he has transferred only a part of his property, we should take it up again where they have abandoned it for more reasonable tests, and should insist on applying it to cases in which they never deemed it applicable, viz., where he has transferred the whole of his property,

Judgment.

Street, J.

In my opinion, therefore, notwithstanding the fact of pressure in the present case, and without losing sight of the distinction which arises in many cases between the intention with which an act has been done and the effect of the act, we should find that the debtor made the transfer in question with the full knowledge that its only and necessary effect must be to prefer the plaintiffs to his other creditors, and with the fraudulent intention of preferring the defendants over his other creditors, and that therefore the transfer is void: *Spirett v. Willows*, 3 D. J. & S. 293; *Freeman v. Pope*, L. R. 5 Ch. 538; *Ex p. Mercer*, 17 Q. B. D. 290.

The motion should, therefore, be allowed and judgment entered for the plaintiffs with costs of the action and motion.

FALCONBRIDGE, J.:—

There was no notice of motion given by the defendants against the findings in fact of the learned Chief Justice, nor, if there had been, would we have felt ourselves justified on the evidence (leaving out of consideration the advantage enjoyed by the trial Judge of seeing the witnesses) in interfering with them in the slightest degree. The whole current of testimony runs in one and the same direction.

It only remains to consider whether the R. S. O. ch. 124, sec. 2, has been so completely annulled, cancelled, and repealed by some recent decisions as the Chief Justice seems to think it has been; in other words, whether in bowing with reluctance to the binding authority of those judgments he has not gone further than the facts of this case require.

It is, I think, a corollary of the Chief Justice's findings that the pressure alleged to have been adopted here was not a *bonâ fide* pressure but a sham pressure. The debtor was utterly insolvent, and had in fact come down to make an assignment: *Ivey v. Knox*, 8 O. R. at p. 645; *Long v.*

*Hancock*, 7 O. R. at p. 157; 12 A. R. 137; *Ex p. Hall*, 19 Judgment.  
Ch. D., per Jessel, M. R., at p. 583; *Ex p. Griffith*, 23 Ch. Falconbridge,  
D., per the same Judge at p. 72. J.

While I think the amendment has been practically repealed by the recent decisions, yet the rest of the section remains to be construed as before the amendment was introduced; and finding, as I do, the pressure here to be a mere piece of collusion, I think the learned Chief Justice's judgment should be reversed and judgment entered for the plaintiffs with costs of the suit and of this motion.

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## [CHANCERY DIVISION.]

## RE ALGER AND THE SARNIA OIL CO.

*Company—Winding up—Sale by the Court by tender—Extending the time—Accepting last in but highest—"Peremptorily closed."*

The words "peremptory" or "peremptorily" do not always mean "absolutely final," there being a discretion in the Court under special and urgent circumstances whether they shall have that meaning or not. A sale by tender (not saying that the property will be sold to the highest bidder) is a mere attempt to ascertain whether an offer can be obtained within such a margin as the seller is willing to adopt.

In winding up proceedings of a joint stock company, tenders were advertised for the purchase of the company's property, to be received by a certain time when the sale was to be "peremptorily closed." At the time fixed one tender only had been received, and the referee enlarged the time for the arrival of a train which was late. Two more tenders were received by that train: one on behalf of the largest beneficiary under the mortgage, to enforce which the sale was being held, and the other by a stranger, which was a little higher than that of the beneficiary. The latter then by his agent handed in a much higher tender, whereupon the referee instructed notice of the last tender to be given to the other tenderers, and on a subsequent day accepted the last which was the highest tender:—  
*Held*, that he was justified in so doing.

## Statement.

THIS was a winding-up proceeding in which the property belonging to The Sarnia Oil Company was being sold by the mortgagees, The Buffalo Loan, Trust and Safe Deposit Company, by leave of the Court, contained in an order therefor with the approval of a local Judge as Referee.

After an abortive sale by auction, at which the highest bid made was \$5,700, which was under the reserve bid, the property was withdrawn and an order was then obtained giving leave to sell by tender.

Pursuant to this order the property was advertised and tenders asked for, to be sent in before twelve o'clock noon of September 4th, 1891, at which time no tenders were received. The time for receiving tenders was then extended until five o'clock in the afternoon of September 12th, 1891, and an advertisement published headed "Peremptory Sale," and stating: "The time for receiving tenders \* \* has been extended to Saturday, September 12th, 1891, at five o'clock p.m., at which time tenders \* \* will be con-

sidered. If one or more tenders covering the entire pro-Statement. perty are received the sale will be peremptorily closed."

The Referee's report set out what was then done as follows: "I attended at my chambers on Saturday, the 12th day of September, A.D. 1891, at the hour of five o'clock in the afternoon \* \* ; at which time and place only one tender was received covering the whole property being that of John S. Nisbett. The time for receiving tenders was thereupon by me extended for the arrival of the 4.40 p.m. train, which was late, and the opening of the mail thereafter. About 5.30 p.m. two other tenders were received \* \* and brought into my chambers, one of J. C. McColl and one of J. L. Englehart. Thereupon the three tenders which were sealed were opened and found to be as follows:—John S. Nisbett, \$2,000; J. C. McColl, \$10,000; and J. L. Englehart, \$10,015 \* \* . As soon as the contents were known and before anything further was done a tender was handed in by J. C. McColl, who was present at the opening of the tenders, and signed by Russell A. Alger, for \$12,500 \* \* , upon which I instructed the liquidator to notify the said J. L. Englehart of these facts and adjourned until the 21st September \*

\* to consider tenders. At said time and place I was attended by counsel for said J. L. Englehart, the vendors, Russell A. Alger, and for the liquidator, and after argument of counsel I reserved my judgment until \* \* , at which time and place I was attended by counsel aforesaid and also by counsel for said John S. Nisbett, and the last-mentioned counsel urging that the tender of his client should be accepted, being the only tender which complied strictly with the terms of my order, I thereupon held that having relaxed the terms of my order, as to the time for receiving tenders, and before the acceptance of any tender a much higher tender was put in, and after notice to the other tenderers, no higher bid or offer being made, I am now in the interest of the creditors in a position to accept the highest tender before me, and I declare the tender of the said Russell A. Alger to be the highest tender for

**Statement.** said lands and premises, and I declare him to be the purchaser of the same at the price or sum of \$12,500, etc."

From this report both Englehart and Nisbett appealed, and the two appeals were argued at the same time on October 15, 1891, before BOYD, C.

*W. R. Meredith*, Q. C., for Englehart. There is a binding contract by which Englehart should be the purchaser as his was the highest tender when they were opened: *Spencer v. Harding*, L. R. 5 C. P. 561. This is a sale by the Court and should be to the highest bidder: *Holmsted and Langton*, p. 198. In *McAlpine v. Young*, 2 Ch. Ch. 171, the bidder whose bid was refused succeeded in having himself declared the purchaser although the sale was abortive because the suit had abated. The word of the Court should be kept the same as that of any honest man: *In re Opera Company*, [1891] 2 Ch. 154. Under no circumstances should Alger be allowed to bid for he was so largely interested in the mortgage of the Trust Company which had the conduct of the sale that he was really the vendor. No biddings can be opened except on special grounds. I refer to *Osborne v. Foreman*, 8 D. M. & G. 122, aff. *sub nom. Barlow v. Osborne*, 6 H. L. C. 556; *Creswick v. Thompson*, 6 P. R. 52; Rule 105, O. J. A.; *Re Oriental Bank Corporation*, 56 L. T. N. S. 868.

*Hoyles*, Q. C., for Nisbett. The higher bid might be a reason for the Court opening the biddings under the old practice, but our Courts now recognize the policy of section 7 Imperial Statute, 30 & 31 Vic. ch. 48: *In re Bartlett, Newman v. Hook*, 16 Ch. D. 561. The effect of the sale being "peremptory" was to bind the Referee to exclude all the tenders which were not in at the time he fixed: *Falck v. Axthelm*, 24 Q. B. D. 174. I also refer to *Stroud's Judicial Dictionary*, under "Peremptory Sale" and "Without Reserve" and the cases there referred to. Under the conditions of sale the Referee had no right to extend the time. Nisbett being the only one who had a tender in

at the time fixed should have been declared the purchaser. *Argument.*

*E. R. Cameron*, for the vendors and Alger. The advertisement does not shew that the sale was without reserve. The words "peremptorily closed" do not intimate any such term. The sale could have been "peremptorily closed" by accepting the \$10,000 tender and refusing the \$10,015, and the Court would not have interfered with the discretion. There was nothing to prevent an open tender and Alger's tender was in before the sale was closed, and so the advertisement was strictly complied with. Tenders are not the same as biddings: *Barlow v. Osborne*, 6 H. L. C. at p. 566. *Spencer v. Harding*, L. R. 5 C. P. 561, is in our favour; it was there held that the vendor was willing to bargain for the sale, but did not undertake to sell to the highest bidder. All the parties had the right to bid but the vendors, and so Alger had a right to tender. Even if he had to obtain leave he could have done so from the Referee when his tender was handed in.

*MacMillan*, for the liquidator. No injustice is done the other tenderers, as they had an opportunity to increase their offers and the creditors will get the benefit of the higher price.

*Meredith*, Q. C., and *Hoyles*, Q. C., in reply.

October 20th, 1891. BOYD, C.:—

When a sale by auction is announced as "without reserve:" this means that the vendor shall not bid nor any one on his behalf, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not: *Warlow v. Harrison*, 1 E. & E. at p. 316 (Martin B.). But when a sale is advertised by tender (not saying to be sold to the highest bidder) it is a proclamation that the owners are ready to chaffer for the sale, and to receive offers for the purchase. It is a mere attempt to ascertain whether an offer can be obtained, within such a margin as the sellers are willing to adopt: *Spencer v. Harding*, L. R. 5 C. P. at p. 564.



Judgment.

Boyd, C.

While the general rule, in the absence of special conditions, is that in sales by the Court the highest bidder should be accepted, yet the Master is not bound to accept the highest bidder ; but ought to consider all the circumstances in the same way as an independent owner would in dealing with his own property: *In re Costello's Minors, Ex. p. Dillon*, 2 J. & L. 244.

What the Court always looks at in sales, made under its authority, is to do the most complete justice to those whose property it has ordered to be sold, and to obtain for such property the highest price that any one will give for it. It follows, therefore, that, unless when to act otherwise would operate unjustly on other parties, the Court will always sell the property to the highest bidder : *Re Sir Thomas Jones' Settled Estates*, 1 Giff. at p. 287.

In the present case there was on the 19th August, 1891, an unsuccessful attempt to sell by auction, when the highest offer (\$5,700) fell short of the reserved bid. The mortgagees were then empowered to sell by tender, subject to the Judge's approval by order of 24th August, 1891, the tenders to be deposited by noon on 4th September. No tenders being then received, the time was extended to the 12th September, at five p.m. Only one tender was then in by Nisbett offering \$2,000. The Judge waited till the arrival of the afternoon train, due at 4.40, which was on that day late, and by half-past five two other tenders were received, one by McColl for \$10,000, and one by Englehart for \$10,015. Upon these being opened McColl, who was acting in the interests of General Alger, one of the largest beneficiaries under the Buffalo Loan, Trust Company's mortgage handed in a tender by Alger for \$12,500. The Judge took no action then, but directed the other tenderers to be notified of what had taken place and upon all appearing before him on a subsequent day he accepted the highest tender, being that of General Alger.

Two appeals were lodged, one by each of the other tenderers, based upon the terms of the advertisement, extending the time till the 12th September. The notice

was that the time for receiving tenders had been extended "to Saturday, 12th September, at five o'clock p.m., at which time tenders for the entire property \* \* will be considered; and that if one or more tenders covering the entire property are received the sale will be peremptorily closed."

Judgment.

Boyd, C.

Nisbett contends his was the only tender in at five o'clock. Englehart contends that he was the highest bidder by closed tender, and that to allow a further tender to be made after the opening of the closed tenders is a pernicious practice at variance with the policy of the Court against opening biddings for a mere advance in price.

Both parties rest on "*peremptorily*" as aiding their appeal. But this term does not fetter the judicial discretion of the Judge in giving his sanction to the sale. He would have been derelict in duty had he accepted the tender of \$2,000, knowing that more than double that sum had been offered a few days before at auction, and knowing that there was an overdue mail which contained or might contain further tenders.

I rather think that he would have erred had he preferred Englehart's bid to that of McColl, representing General Alger, who was interested to the extent of \$80,000 in the mortgage under which the sale was being had. In truth, there was no opening of biddings, for the biddings were not closed by the acceptance of any offer on that day. Nor were the biddings closed till the absentees had a further opportunity of advancing.

I do not say that the Judge should have permitted an open competition as in an auction-room, but he was right in giving the others an equal chance to advance upon the \$12,500. When they declined to do so, then, and not till then, did he close the biddings and declare who was the highest bidder. The policy of the Court is not against this course and the justice of this particular case is served by it.

The vendors were the mortgagees, and though General Alger is a party to the proceedings, he is not precluded by

Judgment. | the strictest rule of the Court from bidding ; and the Judge  
Boyd C. | knowing all the circumstances allowed him to do so, pursuing the same course as when he, on the sale by auction, allowed the parties to bid.

As to the word "*peremptory*," the authorities are consistent as to its meaning. Thus, in the phrase "peremptory order," it means that the order is given on the footing that it is to be final unless some very special and urgent circumstances are brought forward as a reason for altering it : *Falck v. Axthelm*, 24 Q. B. D. at p. 177. So in an early case, Plumer, V. C., said, "the last order does certainly purport to be a peremptory order, but, I think, the Court has sometimes, in these cases, given further time notwithstanding that expression:" *Edwards v. Cunliff*, 1 Madd., at p. 289.

Besides the citations already made, I would refer to *Dowle v. Lucy*, 4 Ha. 311 ; *Else v. Barnard*, 28 Beav. 228 ; *Waterhouse v. Wilkinson*, 1 H. & Mil. 636 ; *Barlow v. Osborne*, 6 H. L. C. 556 ; *Re Oriental Bank Corporation*, 56 L. T. N. S. 868.

I dismiss both appeals with costs to the respondent and the liquidator.

G. A. B.

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## [CHANCERY DIVISION.]

## ALDRICH V. ALDRICH.

*Husband and wife — Alimony — Condonation of matrimonial offences — Revival of same by husband's subsequent adultery — Effect of husband's adultery — Evidence.*

Condonation of matrimonial offences is always on the condition that there shall be no repetition of *any* matrimonial offence in the future ; and the effect of a husband's subsequent adultery is to revive previously condoned acts of cruelty.

The evidence of one witness, by confession of loose character, is not sufficient to prove adultery unless corroborated.

Proof of grave misconduct, short of adultery, by a wife will not disentitle her to alimony.

A woman both in law and in morals is justified in leaving and in refusing to return to her husband who has committed adultery ; but his act which breaks up the household does not relieve him from his duty to maintain her ; and proof of that offence would be sufficient upon which to award alimony.

THIS was an action for alimony brought by Jessie Aldrich against her husband, Frederick E. Aldrich. Statement.

The action was tried at Ottawa, on October 29th, 1891, before BOYD, C.

*T. McVeity*, for the plaintiff.

*R. G. Code* and *J. F. Orde*, for the defendant.

The facts fully appear in the judgment.

December 3, 1891. BOYD, C.

Domestic discord, in which the husband is more blameworthy than the wife, forms the burden of this evidence. Her "aggressive temper" was doubtless exasperated by his dissipated habits. In time of sobriety his conduct is not complained of, but when intoxicated he displayed violence towards his wife which has been again and again condoned. Each was jealous of the other ; but while he has admitted adulterous intercourse, she is not proved to have crossed the line, though guilty of grave indiscretion.



Judgment.

Boyd, C.

So far as cruelty is concerned, I have to enquire whether the separation took place because of violence which rendered longer cohabitation unsafe. The language of Dr. Radcliff well expresses the attitude of the Court in cases of continual bickering. "This Court," he says, "is not in the habit of interfering in ordinary domestic quarrels, and there may be much unhappiness from unkind treatment, or violent and abusive language, in which no relief can be had here; but the parties complaining are to be left to correct the intemperance by such private means as they can employ for the purpose": *Carpenter v. Carpenter*, Milw. R. 159.

Now the testimony of the wife is, that though there was a demonstration of violence towards her on the 16th of August, 1890, yet there was no leaving of home on that account. She soon after (about 4th September), as they were breaking up house, sailed with her children for England, with the intention, as she says, to return to her husband.

Violence proved before this, must be regarded as condoned, and there was then no such repetition of cruel acts giving occasion to the withdrawal of the wife from her husband as would revive the past. Upon the evidence, I see no reason to conclude that the parties might not have gone on with the same manner of connubial life, unsatisfactory and stormy though it might be, after the 16th August, as they had lived for a dozen years before.

The real issue to be decided, arises after the 16th August, and in consequence of the wife's determination to return from England sooner than the husband expected. The husband wrote her on 18th December, 1890, saying it would be impossible for him ever to live with her again, and referring to her behaviour with one Fairweather. The plaintiff's evidence is that she returned in order to confute the charge in hopes that they might come together again, but failing that, that she would try to get alimony. In answer to me, she said, "I decline to return to my husband now, because he has been living with another as his wife. This, I suspected before, now it is confessed." The

acts of adultery admitted were after August, and during the plaintiff's absence from Canada.

Judgment.  
Boyd, C.

Now the effect of this adulterous intercourse is to revive the condoned acts of cruelty. Condonation is always on the condition that there shall be no repetition of any matrimonial offence in the future. It extends not merely to one of the same nature, but to any other which falls within the cognizance of the Court: for example; cruelty condoned is revived by adultery, as in the present case: *Palmer v. Palmer*, 2 Sw. & Tr. at p. 62; *Waddell v. Waddell*, *ib.*, at p. 587; *Blandford v. Blandford*, 8 P. D. at p. 20.

Apart from the conflict of evidence between husband and wife, I think acts of violence are proved by Dr. Shillington in February and June, 1890, upon the person of the wife, both insulting and cruel. Had the case rested at this stage, I should not hesitate to award alimony. Indeed, the adultery alone is sufficient in my opinion, though that was left undetermined in *Howey v. Howey*, 27 Gr. 57, inasmuch as a woman, both in law and in morals, is justified in leaving, and in refusing to return to her husband who has committed adultery. But his act which breaks up the household, does not relieve him from his duty to maintain her.

I now turn to the justification and defence of the husband. Circumstantial evidence has been given by one witness of conduct on the part of the plaintiff, which unexplained and uncontradicted, would lead to the conclusion that she had been guilty of adultery. The husband also swears that the wife confessed her guilt before they separated in August, 1890. This one witness, being by confession, of loose character, would not be sufficient in these circumstances to prove adultery, unless corroborated: *Ginger v. Ginger*, L. R. 1 P. & D. 37. But the corroboration by the admission deposed to by the husband, does not weigh with me. The tone of his correspondence thereafter with his wife down to the 18th December, 1890, was so genial and friendly, as to repel the idea that he was

Judgment. addressing an adulterous wife. There is besides essential  
Boyd, C. contradiction in other parts of the evidence of the husband and his one witness, which so detract from it, that I prefer to accept the denials and explanations of the wife and those implicated with her.

But while the distinct offence has not been proved, I cannot pass over unnoticed the indiscreet acts and conduct of the plaintiff which are not disputed.

The wife's conduct with the man named has not been disposed of to my satisfaction. He was much with her, they drove together in cabs; he admits being seated with her alone and holding her hand. Against the husband's wish, he accompanied her from Ottawa, and saw her on ship-board; he went to meet her on her return; and during the interval, they corresponded clandestinely through the intervention of a young lady in Montreal, who signs herself "Jim." Passages in a letter written by this person to the plaintiff (which came to the house of the mother-in-law in England, after the plaintiff left, and was forwarded to the husband), referring to "F.," are so equivocal in meaning that I thought an opportunity should be given of calling the writer as a witness. This has not been done by either party, and although I might delay judgment indefinitely, till this person was produced as a witness, I have thought it best to decide according to the weight of authority upon similar demerits.

The latest decision I have found is in 1876, of *Rippingall v. Rippingall & Delacour*, 24 W. R. 967, in a suit by the wife for restitution of conjugal rights. The defence was adultery, but the proof failed to shew more than visiting at the lodgings of the co-respondent, under circumstances that amounted to grave misconduct. It was held by Hannen, P., that she was entitled to require her husband to take her back as her conduct fell short of a matrimonial offence. To the same effect is *Scott v. Scott*, 4 Sw. & Tr. 115, in 1865.

In *Haswell v. Haswell and Sanderson*, 1 Sw. & Tr. 504, it was doubted by the Court whether even indecent liber-

Judgment.

Boyd, C.

ties permitted by the wife, would form an answer to such a suit for restitution. So in *Burroughs v. Burroughs*, 2 Sw. & Tr. 303, it was held on demurrer that a plea of strong and reasonable suspicion of adultery was no answer to the wife's claim in such a suit. See also *Bancroft v. Bancroft*, 4 Sw. & Tr. 84, and *Williamson v. Williamson*, 7 P. D. 76.

In the Irish Court, it was held in 1873, that conjugal rights can be defeated only by acts sufficient to found a decree for divorce; *Manning v. Manning*, Ir. R. 7 Eq. 520. The rather anomalous state of the law on this head, is commented on by Lord Penzance, in *Yeatman v. Yeatman*, L. R. 1 P. & D. 489; and the whole question is much and ably discussed in the Scotch Court, with a difference of opinion among the judges, in *Chalmers v. Chalmers*, 6 Ct. of Sess. Cas. 547, (1868); the majority however holding the general rule of law, as of morals, is, that the vows of marriage can be dissolved by nothing but adultery or *scævitia*, and that nothing is a good defence of the act of wilful desertion that would not be a good defence in an action of adherence.

No distinct matrimonial offence is proved against the plaintiff, and the husband could not therefore be justified in refusing to receive her if she is disposed to return. But he having committed adultery, cannot insist upon her return if she is disposed to live apart.

The husband is maintaining the children, who have been left by the plaintiff in the old country with the mother-in-law. I am not willing to put the husband to the expense of a reference as to what allowance should be made to the plaintiff, as I gather from all the evidence that his resources are scanty, and therefore I will fix the amount upon affidavits being furnished.

G. A. B.



## [CHANCERY DIVISION.]

## RE BOOTH AND McLEAN.

*Vendor and purchaser—Land subject to mortgage for certain amount, at a certain rate—Rate of interest reduced on punctual payment.*

In an agreement for the exchange of land it was stated that the property "was subject to a mortgage encumbrance of \$750, bearing interest at the rate of seven per cent. per annum." The property was one of four houses and lots, mortgaged for \$3,000, with interest at ten per cent., payable half yearly, to be reduced if punctually paid to seven per cent., with an agreement to release each house on payment of \$750:—

*Held*, that the agreement did not convey an accurate statement as to the nature of the encumbrance.

**Statement.**

THIS was an application under the Vendor and Purchasers' Act, R. S. O. ch. 112, arising out of an agreement for the exchange of certain properties, between Charles Herbert Latimer Booth and Alexander Grant McLean.

The agreement was an offer by Booth, accepted by McLean, which stated that Booth's property (a house and lot) was "subject to a mortgage encumbrance for \$750, bearing interest at seven per cent. per annum."

Booth's house and lot was, with three other houses and lots, mortgaged in one mortgage for \$3,000 to the Trinity College School, as to which there was a subsequent agreement between the original mortgagees and three purchasers of three of the houses, of whom Booth was one, reciting that the mortgage contained an agreement to release each house, on a sale being made, on payment of \$750 and interest, and that the purchasers had arranged instead of getting such releases to enter into the agreement. The mortgagees agreed with each purchaser that if the covenants and provisions in the mortgage were duly kept, they would release each lot on payment of \$750 and interest, as provided in the mortgage. The purchasers covenanted to pay the \$750 and interest, as provided, and to observe the provisions, etc., of the mortgage, and it was agreed that the agreement was to be construed as if separate mortgages had

been made for the \$750, containing all the covenants, Statement.  
etc., of the mortgage. It also appeared that the mortgage was drawn with interest payable at the rate of ten per cent., with the privilege of paying at seven per cent. if paid punctually, and was payable half-yearly.

The purchaser objected that the mortgage was not as represented in the contract.

The petition was argued on December 23rd, 1891, before BOYD, C.

*B. N. Davis*, for the vendor. The \$3,000 mortgage is virtually a \$750 mortgage as far as this property is concerned. On payment of that sum the purchaser here will be entitled to an absolute discharge. The interest payable at ten per cent. is only a precaution. If paid when due, or even within ten days thereafter, the rate is merely seven per cent.; that is all the vendor has stipulated. If any default is made, it would be the purchaser's own fault.

*J. A. Ferguson*, for the purchaser. The mortgage is not a seven per cent. mortgage, it is a ten per cent. mortgage. The interest is not payable "per annum," it is payable half-yearly. The \$3,000 mortgage read with the subsequent agreement is not even an equivalent for a \$750 mortgage. The operative part of the agreement is not ambiguous, and is not controlled by the recital: *Walsh v. Trevanion*, 15 Q. B. at p. 751. It provides that upon the observance of all the covenants, etc., contained in it, the mortgagees will release. If any purchaser of any of the other three properties should be in default, it could not be said the covenants were observed. A new mortgage, clear and definite, must be established. The closing part of the agreement is too vague to govern its operative part. Does it make respective purchasers liable for covenants as to title or as to insurance the same as if separate mortgages were given by each?

*Davis*, in reply, referred to *Elphinstone*, *Norton and Clark* on the Interpretation of Deeds, pp. 132, 133, 138 and 139 *In re Hugh Neal's Trusts*, 4 Jur. N. S. 6

Judgment. December 26th, 1891. BOYD, C.:—

Boyd, C.

I think that the recital coupled with the closing parts of the special agreement control or modify the intermediate provision as to the observing of the covenants in the mortgage for \$3,000 by the mortgagees and the party of the third part (Booth). Each lot is in effect charged with its proportion of the whole, *i. e.*, \$750, as if a separate mortgage had been made for that amount, and as if such mortgage had contained all the covenants, provisions, and agreements of the larger \$3,000 mortgage.

This would imply that each such mortgage should contain a covenant to insure, and yet there is no equivalent apportionment made or provided as to the \$3,200 of insurance called for by the \$3,000 mortgage. The holder of that mortgage may be willing to remedy this, and to make more explicit what is meant.

As things stand it cannot be said that this lot is charged merely with a mortgage for \$750 at seven per cent. interest. It is charged with that amount at ten per cent. interest to be reduced to seven per cent. upon payment within ten days after the punctual period.

Altogether I do not think the information given or representation made in the offer of exchange that the lot was subject to an encumbrance for \$750 at seven per cent., conveys an accurate statement of the real facts. One would naturally expect a clear mortgage for that sum at that rate with the usual covenants, and not the cumbrous and complicated duplication of rights and liabilities which is to be found in these papers.

G. A. B.

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## [CHANCERY DIVISION.]

## RE FRASER AND BELL.

*Will—Devise—Estate tail—Remainder expectant thereon—Barring of estate tail—R. S. O. ch. 103, sec. 3.*

A testator by his will devised to his son and “to the heirs of his body” a part of his real estate, and to his daughter and “to the heirs of her body” the remainder of the property and if “either \* \* should die without leaving heirs of their body,” the share of the deceased to the survivor, and “to the heirs of their body,” \* \* and should both die “without leaving living issue” then over in fee simple. The daughter died in the lifetime of her brother, without issue. The son married and had living issue, and conveyed in fee:—

*Held*, that an estate tail vested in the son, and that there was nothing in the will to give the words “die without leaving living issue,” the meaning of “an indefinite failure of issue,” and that the ultimate remainder in fee simple expectant on the estate tail, could be barred by the son.

THIS was an application under the Vendor and Purchaser's Act R. S. O. ch. 112 arising out of an agreement for the sale of land by one Simon Fraser to one Charles Bell.

Fraser claimed title to the property through Judson Wright, a son of one Simon Wright, deceased, a former owner of the land in question, whose will was in these words: “I will, give and bequeath to my son Judson Wright, and to the heirs of his body” (part of the property); “also I will, give and bequeath to my daughter Wilhelmina Wright, and to the heirs of her body” (the remainder of the property); “and if either one of my said children, Judson Wright or Wilhelmina Wright should die without leaving heirs of their body, then in such case I will, give and bequeath to my child who may be the surviving party, and to the heirs of their body the deceased one's share of the real estate before willed; and should both of my said children die without leaving living issue, then in such case I will and bequeath to my brother Daniel R. Wright, his heirs and assigns for ever” (part) “and to my nephew Francis Wright \* \* in case both of my children should die without leaving issue, I will, give and bequeath to him the



**Statement.** said Francis Wright, his heirs and assigns for ever" (the remainder).

Wilhelmina died without issue. Judson Wright married, had issue, and while the issue were living, and after the death of his sister Wilhelmina, conveyed the land to Simon Fraser, the vendor. The purchaser objected to the title on the ground that Judson Wright might yet die without leaving living issue, and, if so, Daniel and Francis Wright would become entitled.

The petition was argued on December 23rd, 1891, before BOYD, C.

*Huson Murray*, Q. C. Wilhelmina Wright, the sister, is dead, leaving no issue. Judson Wright, the brother, took her interest. He married, and had issue. After his sister's death, and while his issue were living, he conveyed the estate tail vested in him, and so converted the estate into a fee simple.

*Hoyles*, Q. C. The first part of the will does seem to grant an estate tail, but that gift is controlled by the subsequent devise over, and the whole will must be looked at and construed together. There is a devise over to Daniel and Francis Wright if Judson Wright leaves no issue living. This benefit to Daniel and Francis makes Judson's interest a mere estate for his life: Hawkins on Wills, 2nd ed., 207; *Hellem v. Severs*, 24 Gr. 320; *Smith v. Smith*, 8 O. R. 677; *Re Cleator*, 10 O. R. at p. 330.

*Murray*, Q. C., in reply.

December 26th, 1891. BOYD, C.:—

By express terms of limitation there is an estate tail vested in Judson Wright.

This will excludes the operation of R. S. O. ch. 109, sec. 32, in giving any restricted meaning to the words "die without leaving (living) issue." These words before the Act imported a general or indefinite failure, and there is

no context here to limit, or of such a nature as to conflict with the estate tail before given.

Judgment.

Boyd, C.

That being so, I think the result is that there is an ultimate remainder expectant on the estate tail in Daniel and Francis Wright which, however, may be barred, and I suppose has been barred by the disposal in fee by Judson Wright: R. S. O. ch. 103, sec. 3; *Hellem v. Severs*, 24 Gr. 320, and *Richards v. Davies*, 13 C. B. N. S. 69.

G. A. B.

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## [CHANCERY DIVISION.]

## GAULT ET AL. V. MURRAY ET AL.

*Damages—Undertaking as to—Injunction—Dismissal of action at trial—Refusal of reference as to damages.*

The jurisdiction to award an enquiry as to, or to assess damages without a reference, where an injunction has been granted and an undertaking as to damages given, is a discretionary one, to be exercised judicially and not capriciously.

Where in an action to set aside a sale of goods as fraudulent, a claim for damages by reason of an injunction was set up in the defence, and the trial Judge was on the evidence of opinion that no damage was proved occasioned by the injunction as distinct from the detriment arising from the litigation, and no additional evidence having been given, the Divisional Court under the circumstances of this case, where the defendant was given his costs, although his conduct had been such as properly to provoke legal enquiry, refused to award a reference as to damages.

Decision of ROSE, J., affirmed.

## Statement.

THIS was an appeal from the judgment of ROSE, J.

The action was brought by the plaintiffs on behalf of themselves, and all other creditors of the defendant Murray, to set aside as fraudulent the sale and transfer of the stock-in-trade and business of the defendant Murray to one John McIntosh, and an injunction was obtained before the trial, restraining the defendant McIntosh from dealing with the stock, the business was, however, by agreement between the parties, carried on by that defendant under supervision.

At the trial which took place before ROSE, J., without a jury at the Autumn Assizes, at Toronto, on 19th, 20th, and 22nd days of October, 1891.

*Geo. Kerr, Jr.*, appeared for the plaintiffs, and

*E. D. Armour, Q. C.*, for the defendant, McIntosh.

The action was dismissed, the learned Judge, after summing up the evidence, holding that the conduct of the defendant McIntosh was so suspicious as to provoke enquiry, but that there was no evidence of any knowledge of the indebtedness of Murray at the time upon which he

could set aside the sale, and he then proceeded as follows : " I Statement. should have been inclined, following what I understand to be the rule that is acted upon in the Chancery Division, to relieve the plaintiffs from the costs of the action, as far as the defendant McIntosh is concerned, on the ground that his conduct provoked enquiry, and that the enquiry was reasonable, but for the following consideration, which I shall now deal with.

The defendant McIntosh has, I think, suffered loss by reason of the litigation, but not as far as the evidence discloses, by reason of the injunction. I cannot see any evidence which points to any loss happening to him by reason of the injunction. I think, however, he has suffered, and probably suffered considerably, from the fact of the pending litigation which rendered his position so uncertain, that he has been unable to carry on business with that vigour and freedom which would have enabled him to succeed financially. I do not think it fair that he should bear that loss by reason of litigation, which I am compelled to hold, has not been successful, and also pay his own costs of the action.

While I am unable to relieve the plaintiffs from the payment of the costs of the action, I find no evidence upon which I can direct any enquiry as to damages by reason of the injunction. In my opinion the damages, such as the defendant McIntosh has suffered, were damages flowing from the existence of the litigation, and not in any way consequent upon the injunction having been granted ; and therefore the undertaking which was given at the time of the granting of the injunction, does not, I think, render necessary or proper any reference as to damages."

From this part of the judgment, the defendant McIntosh appealed, on the ground that a reference as to the damages should have been ordered, and the plaintiffs appealed on the ground that they should have been allowed their costs, and the appeals were argued on December 12th, 1891, before BOYD, C., and FERGUSON, J.



## Argument.

*E. D. Armour*, Q. C., for McIntosh. The trial Judge should have granted a reference, as the defendants relied upon the plaintiffs' undertaking, given on the obtaining of the injunction. Even when the agreement was entered into under which the business was carried on, it was specially stipulated that the undertaking was to be continued. The undertaking is the same as a bond of indemnity, and a successful defendant is entitled to sue on it. We applied at the trial for a reference, as we were bound to do there, and were refused. We could not be prepared with affidavits, as we could not foresee the dismissal of the action when the right first arose, and we are entitled to show the facts now. We are entitled to a reference at our own risk as to the result: *Newby v. Harrison*, 3 D. F. & J., 287. The question of costs should not be mixed up with the damages; *Novello v. James*, 5 D. M. & G. 876. I also refer to *Graham v. Campbell*, 7 Ch. D. 490; *Newcomen v. Coulson*, *ib.* 764; *Griffith v. Blake*, 27 Ch. D. 474. A receiver being put in makes no difference; *Dreyfus v. Peruvian Guano Co.*, 42 Ch. D. 66. The two cases which may be relied upon by the other side, are *Featherstone v. Smith*, 20 Gr. 474, and *Hessin v. Coppin*, 21 Gr. 253; but in the former the application was held premature, as the value of the timber limits had increased, and there might be no loss; and in the latter, the plaintiff's conduct was bad, and it was refused on that account.

*Geo. Kerr, Jr.*, for the plaintiffs. The question of damages was raised on the pleadings, but none were shown at the trial. The trial is the place to show damages; *Smith v. Day*, 21 Ch. D. 421. The undertaking could not be sued on, as the damages are entirely in the discretion of the Court, and when judgment is once given on the point, it should not be interfered with: judgment of Brett, L. J., at p. 427. In this case, the business went on just as usual under an agreement between the parties, so that the injunction practically had no effect. The trial Judge gave costs to the defendants virtually as damages; and if the plaintiff is held to be technically entitled to a reference as

to damages, the case should be placed as the trial Judge **Argument.** intended.

*Armour*, Q. C., in reply. The costs cannot be interfered with as a substantive motion, as no appeal lies on the question of costs. The discretion of the trial Judge can be interfered with.

January 27th, 1892. BOYD, C. :—

The form of undertaking as to damages was here, as usual, thus expressed: "The plaintiffs' undertaking to abide by any order the Court may make as to damages in case the Court shall hereafter be of opinion that the defendants shall have sustained any, by reason of this order, which the plaintiffs ought to pay." It has to appear therefore that damages have been sustained by reason of the order, and that those are such as the plaintiffs ought to pay. This imports manifestly a discretion as to the award of any inquiry as to damages and as to the assessment of damages without a reference.

This was expressly enunciated in *Newby v. Harrison*, 3 D. F. & J., by Turner, L. J., who said, at p. 290: "We must hear the case upon the question whether the jurisdiction ought to be exercised, for there may be cases in which the Court will not consider it just to enforce an undertaking, though the jurisdiction to do so exists."

Such a case is reported where Wood, V. C., acted very much as the learned Judge did on this application: where in specific performance by plaintiff he obtained an injunction to restrain the defendant from letting the hotel in dispute, to any one other than the plaintiff, and much loss arose from being unable to let the house during the exhibition year. The bill was dismissed without costs, because it had been filed not without some foundation. It was quite plain, said the Vice-Chancellor, that the Court could not have allowed the property to be dealt with during the litigation. He said the plaintiff was not wrong in coming to the Court, and it would be monstrous that he should be

Judgment. made to bear all the costs and damages incident to a litigation, which the Court had thought he was right in instituting, although he had not succeeded at the hearing: *Bingley v. Marshall*, 11 W.R. 1018, 2 N.R. 546 (1863). As put in the head note, the loss to the defendant had arisen, not from the injunction, but from the pendency of the litigation. This case is referred to by the Court in *Featherstone v. Smith*, 20 Gr., at p. 476.

Boyd, C.

The same element appears in *Graham v. Campbell*, 7 Ch. D., at p. 494, where Malins, V. C., having refused an inquiry as to damages because of his unfavourable view of the conduct of the plaintiff's agent, he was reversed because of the appellate Court disagreeing with his estimate of that conduct. James, L. J., in giving judgment, says that "if any damage has been occasioned by an interlocutory injunction, which, on the hearing, is found to have been wrongly asked for, justice requires that such damage should fall on the voluntary litigant who fails, not on the litigant who has been *without just cause* made so." But if the defendant in such case has been made a party *with just cause*, even though he may succeed, it does not follow that he gets damages. Such was the case in *Hessin v. Coppin*, 21 Gr. 253, when the Court deemed the conduct of the defendant not so meritorious as to warrant an inquiry as to damages.

The jurisdiction to award damages on such an undertaking, is a discretionary one, to be exercised however judicially and not capriciously; *Ex p. Hall*, 23 Ch. D. 644.

The present case is peculiar, because the defendant has set up his claim for damages, by reason of the injunction, in the defence, and has not kept the matter as a collateral one, to be dealt with at the close of the case. The Judge was of opinion that he had made out no damages occasioned by the injunction, as distinct from the detriment arising from the litigation, whereby his title to the property was impeached: in this respect we are in the same position as the trial Judge, for no additional evidence is

laid before us. Mr. Armour indicated some matters of damage from the injunction, but these do not impress me as of that character. The one most relied on—the withdrawal of a skilled workman from the business—I take it, was prompted rather by the desire to set up an independent business (which he has done), if he could not purchase this one.

Judgment.

Boyd, C.

Again the trial judge has found that the conduct of the defendant in getting this business as he did, provoked inquiry, and that the consequent litigation was with such justification as would justify the withholding of costs. These, however, he ordered to be paid, because the business must have suffered on account of the unsuccessful action brought by the plaintiffs.

It is to be noticed that the injunction to restrain the defendant from dealing with the business, was forthwith practically superseded by an agreement under which the concern was carried on, subject to the supervision of the plaintiffs. This restraint could not be greater than would result from the mere fact of litigation followed by such an undertaking from the defendant as the Court must exact in order to see that the subject matter of controversy or its equivalent is forthcoming at the end of the strife. One knows what a volume of litigation arises out of attempts to defraud creditors, and in commercial circles there are manifold schemes by which the dishonest trader can get rid of his assets to the prejudice of his creditors.

It is not well to bear hardly on cases of this kind, which fail in proof—although amply justified by circumstances of suspicion, which just fall short of demonstrating fraud. The plaintiff fails; but the defendant escapes by the skin of his teeth, and has only himself to thank if his venture proves less successful than if he had been left unmolested in the possession. The Judge has believed this case to be of that suspicious character which invited investigation. The discretion vested in him as to awarding the inquiry as to damages should not be lightly disturbed.

I agree in the estimate he makes of the conduct of the



Judgment. defendant, and for this reason, I agree that his judgment  
Boyd, C. should be affirmed. If the inquiry as to damages were entertained, it should only be by changing the judgment as to costs.

Costs should be withheld from an unmeritorious defendant, if in a case like this he had a right to insist on damages as of course. But that is not, I think, the proper alternative, and I am content to leave the present result undisturbed.

FERGUSON, J., concurred.

G. A. B.

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## [COMMON PLEAS DIVISION.]

## IN RE HENRY GARBUTT.

*Extradition—Junior Judge of County Court an extradition judge—Interested witness—Corroboration—Alibi—Evidence of, admissibility.*

In extradition proceedings for forgery of a draft on a bank in the United States :—*Held*, that a junior judge of a county court of this Province is an extradition judge within the Extradition Act, R. S. C. ch. 142 : *Re Parker*, 19 O. R. 612, followed.

In extradition cases a warrant of commitment may be issued in proceedings instituted in this Province ; the previous issue of a warrant in the country demanding extradition not being essential : *Re Caldwell*, 5 P. R. 217, followed.

In such cases evidence in support of an alibi should be refused.

A witness identifying the prisoner as the forger was the person who identified him at the bank when he procured the amount of the forged draft ; but it did not appear that he had incurred any responsibility to the bank :—

*Held*, that no interest was shown in the witness so as to require corroboration ; and further that the interest must be apparent on the face of the draft or immediately arise from the nature of the transaction or from his own acknowledgment.

*Regina v. Hagerman*, 15 O. R. 598 followed.

*Semble* in extradition cases the evidence of interested parties need not be corroborated.

THIS was an application on the return of a *habeas corpus* Statement. for the discharge of Henry Garbutt from custody, under a warrant of Judge Morgan, one of the Junior Judges of the county of York, acting as an extradition judge, committing the applicant to await extradition to the State of Texas.

After the judgment of Mr. Justice Street, reported in 21 O. R. 179, and on the day the warrant for the extradition of the prisoner was signed by the Minister of Justice, a second writ of *habeas corpus* was applied for on new material, and granted by the learned Chief Justice of this Division, which was made returnable before the Divisional Court.

In Michaelmas Sittings, November 18th, 1891, *Lount*, Q. C., *Meyers*, Q. C., and *Murdoch*, supported the motion for the discharge of the prisoner before a Divisional Court, composed of GALT, C. J., and MACMAHON, J. The evidence of House, who spoke as to the identity of

**Argument.** the person signing the document, should have been corroborated, as he was an interested witness. He was State Marshal and interested in the reward offered, and would also be liable to the bank as indentifying the defendant at the bank. In a case within the jurisdiction of our courts, corroboration would be required; *Clarke on Extradition*, 3rd ed., 118, 119; *Re Caldwell*, 5 P. R. 217; *Regina v. Giles*, 6 C. P. 84, 86; *Regina v. McDonald*, 31 U. C. R. 337; *Spear on Extradition*, 309, 310, 479, 498. The next point is, that Judge Morgan being the junior judge of the County Court, is not an extradition judge within the Act, sec. 2, sub-sec. 9: sec. 5. If it were intended that he should be such judge, the Act would have expressly said so. The next point is, that the deposition evidence is not receivable—such evidence is receivable only where a foreign warrant has been issued, and none has been issued in this case; *Regina v. Browne*, 6 A. R. 386; *Re Phipps*, 8 A. R. 77, 100. An indictment was laid, but that is not sufficient; and further, the indictment charges an offence committed on the 12th March, whereas the offence now charged, is stated to have been committed on the 2nd March. The offence must be specifically charged. The order of commitment is also defective. It merely alleges that the defendant was guilty of forgery. It should set out the specific act of forgery. It is the basis of the trial in the foreign country, and under it the defendant could be held for any offence which constituted forgery, though not the one on which the proceedings for extradition were laid. The deposition evidence, however, is not receivable, as it is not certified before a judge, magistrate, or officer of the foreign State. It is taken before a notary public, which is clearly not sufficient. The next point is one of very great importance to the defendant, namely, whether alibi evidence is admissible. The evidence here presented is of the strongest and most convincing character, as it is shewn by a host of credible witnesses that the defendant was in Wingham, Ontario, at the time he is charged to have committed the offence in Texas. It is of the utmost im-

portance to a defendant charged with the commission of an **Argument.** offence of an extraditable character, that such evidence should be admitted. If the offence were committed within the jurisdiction of our courts, the defendant has the means of compelling the attendance of the witnesses, but there is no such power if once extradited. Section 9 of the Act clearly allows such evidence. Sub-section 2 says, the judge shall receive on oath, etc., the evidence of any witness "tendered to shew the truth of the charge," etc.; and sub-section 3 shews that evidence for the defence can be entered into; for instance, it can be shewn that the defence is of a political character, or not an extraditable offence. The evidence clearly goes to shew the truth of the charge. See also the Criminal Procedure Act, R. S. C. ch. 174, sections 60, 69, 73. These sections shew the magistrate must be seized of the facts and circumstances: *Re Burleigh*, 1 U. C. L. J. N. S. 46; *Regina v. Reno*, 4 U. C. L. J. N. S. 315, 320-321; 4 P. R. 281; *Re Phipps*, 8 A. R. 77, at p. 112; Clarke on Extradition, 3rd ed., 64, 76-77, 99, 100, 115-117, 120, 137-8; Moore on Extradition, 526-8, sec. 346; *Regina v. Carden*, 5 Q. B. D. 1, 6; *Regina v. Griffiths*, 16 Cox C. C. 46; *United States v. Rauscher*, 119 U. S. 407; *Re Woodhall*, 4 Times L. R. 532. The defendants ask leave to put in additional affidavits. They are clearly admissible in *habeas corpus* proceedings.

*Aylesworth*, Q. C., and *Curry*, contra. As to the question of interest. [GALT, C. J.—You need not discuss this as we are of the opinion that the witness House had no interest within the meaning of the Act.] Then as to the validity of the depositions. Every material fact has been proved by oral evidence, and the depositions are not essential. The depositions, however, are clearly admissible. There is no necessity for the issue of a foreign warrant. The law was changed by 40 Vic. ch. 25, sec. 11 (D.), consolidated in R. S. C. ch. 142, sec. 6. This section shews that the extradition judge "may issue his warrant, etc., on a foreign warrant of arrest, or on an *information* or *complaint* laid before him," etc.: *Re Weir*, 14 O. R. 389.



## Argument.

Under the old Act, 31 Vic. ch. 94 (D.), printed in the statutes of 1869, appendix p. 13, a foreign warrant was required, and it is by force of this statute that the cases relied on by the other side were so decided. Sec. 6 shews that the foreign depositions are admissible. Then as to the authentication of the documents. The question whether the documents were authenticated before proper judicial officers in the foreign country becomes immaterial as the documents were all authenticated by oral evidence before the extradition judge: *Regina v. Matthews*, 7 P. R. 199; *Re Phipps*, 8 A. R. 77; *Re Browne*, 6 A. R. 395-397; *Re Lee*, 5 O. R. 593-594; *Re Weir*, 14 O. R. 389. Then as to the point whether judge Morgan is an extradition judge within the Act. It is expressly decided by Judge Rose in *Re Parker*, 19 O. R. 612, that he is. As to the admission of evidence in support of an alibi. This is really the important question. In the first place we object to the reception of new affidavits, as the question must be disposed of on the material before the extradition judge; but if received then an opportunity should be afforded the prosecution to cross-examine the deponents on their affidavits. The question is, was the learned Judge bound to receive such evidence? Alibi is simply a defence, and to receive evidence in support of an alibi, is in fact to try the case. This is a question for the foreign tribunal; all the extradition judge has to do is to satisfy himself that a *prima facie* case is made out. The statute is quite clear on this point. Sub-section 2 of section 9, shews what evidence is admissible, namely, merely "Evidence to shew the truth of the charge," etc., with two exceptions, as pointed out in sub-section 3, namely, evidence is admissible to shew that the crime is of a political character, or the offence is not extraditable. See also sections 60 of the Criminal Procedure Act, R. S. C. ch. 174; *Re Burleigh*, 1 U. C. L. J. N. S. 20, 34; *Re Caldwell*, 5 P. R. 217, 221; *Regina v. Reno*, 4 P. R. 281; *Re Phipps*, 8 A. R. 77; *Re Hall*, 8 A. R. 31, 39; *Re Parker*, 19 O. R. 612, 616; Moore on Extradition, p. 1021, secs. 632-633: *Robinson v. Flanders*, 29 Ind. 10.

November 26th, 1891. The judgment of the Court was delivered by

Judgment.  
MacMahon,  
J.

MACMAHON, J.:—

The first point raised was that Judge Morgan being the junior judge of the County Court of the county of York, was not an extradition judge within the Act.

Mr. Justice Rose considered the point in his judgment in *Re Parker*, 19 O. R. 612, and disposed of the objection by a reference to the Extradition Act (R. S. C. ch. 142, sec. 5), which provides that "all judges \* \* of County Courts in any province, \* \* are authorized to act judicially in extradition matters under this Act, within the province."

That a junior judge is included within the above section is made clear by R. S. C. ch. 138, the interpretation clause of which provides that "the expression 'Judge,' as applied to County Courts, includes a junior judge."

The objection that the warrant of commitment was issued on proceedings initiated in this country, and that a foreign warrant, that is, a warrant from the country demanding the prisoner's extradition, must issue before he is extradited, has no validity and cannot be supported.

By the Extradition Act of 1886 R. S. C. ch. 142, sec. 6, the extradition judge may issue his warrant for the apprehension of a fugitive "on a foreign warrant of arrest, or on an information or complaint laid before him, and on such evidence or after such proceedings, as in his opinion would, subject to the provisions of that Act, justify the issue of his warrant if the crime of which the fugitive is accused \* \* had been committed in Canada."

In this case the information was sworn before Judge Morgan as extradition judge, charging the prisoner with having forged a bank draft or order for payment of money to the amount of \$1,500, and also that he uttered the said draft within the United States, to wit, in the State of Texas.

The point raised by the objection was discussed in *Re*

**Judgment.** *Caldwell*, 5 P. R. 217, at pp. 219-220, where Wilson, C. J., said: "The Judge or other person acting, may proceed upon original *vivâ voce* testimony in like manner, 'as if the crime had been committed in this province.' He may, however, also receive copies of the depositions on which the original warrant was issued in the United States in evidence of the criminality of the accused. This, however, is an enabling Act. There is no obligation on the prosecutor to produce such depositions. And I do not conceive that the statute requires that there shall be first such depositions taken, and a warrant granted thereon in the United States, to give jurisdiction to the magistrate here."

**MacMahon, J.**

The ground most strongly urged before us on this motion was as to the refusal of the extradition judge to hear evidence in support of an alibi, which the prisoner wished to set up before him.

The 9th section of the Extradition Act requires a judge to hear "the case in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace charged with an indictable offence committed in Canada." Sub-section 2 provides that, "the judge shall receive upon oath or affirmation if affirmation is allowed by law, the evidence of any witness tendered *to show the truth of the charge* or the fact of the conviction." And by sub-section 3 it is provided that, "the judge shall receive in like manner, any evidence tendered to show that the crime of which the fugitive is accused or alleged to have been convicted, is an offence of a political character, or is, for any other reason, not an extradition crime; or that the proceedings are being taken with a view to prosecute or punish him for an offence of a political character."

Where a person is charged before a justice of the peace with an indictable offence, by the Criminal Procedure Act, (R. S. C. ch. 174, sec. 73): "If the offence is a felony, and the evidence given is such as to raise a strong presumption of guilt, then the justice shall, by his warrant, commit the accused to the common gaol for the territorial division, to which, by law, he may be committed."

“ All that a committing magistrate—or the judge or court before whom the accused is brought upon *habeas corpus*—has to do, is to determine whether the evidence of criminality would, according to the laws of this province, justify the apprehension and commitment for trial of the accused, if the crime charged had been committed (or alleged to have been committed) therein.” Per Draper, C. J., in *Regina v. Reno*, 4 P. R. 281, at p. 295.

Judgment.

MacMahon,  
J.

The 11th section of the Extradition Act, expresses in very clear terms, the duty of the extradition judge where a charge of the present character is before him as follows: “ If, in the case of a fugitive accused of an extradition crime, such evidence is produced as would, according to the law of Canada, subject to the provisions of this Act, justify his committal for trial, if the crime had been committed in Canada, the judge shall issue his warrant for the committal of the fugitive,” etc.

The words, “ such evidence, \* \* according to the law of Canada, subject to the provisions of this Act,” mean that the extradition judge shall—once an extradition crime is proved to have been committed and the identity of the fugitive is established to his satisfaction—only receive the evidence on the part of the prisoner provided by sub-section 3 of section 9, namely: that the crime is of a political character, or for any other reason, is not an extradition crime, or that it is designed to prosecute or punish him for an offence of a political character.

The question as to *alibi* evidence in extradition cases, was fully discussed by Draper, C. J., in the case already referred to of *Regina v. Reno*, 4 P. R. at p. 298, where he says, “ If there is not sufficient evidence of criminality, the magistrate ought not to commit; if there is, I think he ought, notwithstanding there is evidence sufficient, if true, to sustain an alibi.” \* \* It is very easy to point out the danger that contrasting conflicting evidence, or considering the credibility of witnesses and similar matters might lead to. It would for many purposes be assuming the functions of a jury, and trying the



Judgment.  
MacMahon,  
J.

whole merits of a case upon an enquiry instituted only to ascertain if there is such evidence of criminality as would justify the apprehension and committal—not the conviction—of the accused. The treaty would be waste paper if a magistrate, appointed to conduct only a preliminary investigation, should, after hearing sufficient evidence of criminality, take upon himself to decide that the incriminating evidence was worthless, or was displaced, because witnesses on the prisoner's behalf, swore to a state of facts inconsistent with the incriminating evidence—for example, as in the present case, swearing to an alibi."

In Moore on Extradition, p. 1021, sec. 632, the author says: "Under the writ of *habeas corpus* the courts have no power to enquire as to the guilt or innocence of the fugitive, but only as to the legality of his detention."

"The question of the identity of the person in custody, with the person named in the rendition warrant, is always open to enquiry on *habeas corpus*. This is a different question from whether the fugitive is the person who committed the crime charged in the warrant. The latter is a question of alibi, and is to be tried by the courts of the demanding State as a matter of defence. It is only necessary that actual identity between the person held and the person named in the warrant, be established." *Ib.* 633.

In Clarke's Law of Extradition, 3rd ed., 218, the author says: "The American rules of practice are similar to those of England, and in *Franz Müller's Case*, the commissioner at New York refused to receive evidence of the *alibi* which was afterwards unsuccessfully attempted in England, nor can there be any doubt of the propriety of his decision."

For the extradition judge to have heard and decided upon the evidence as to an *alibi* tendered on behalf of the prisoner, he would in that case have been in effect performing the functions of the judge and the jury, who would be eventually called upon to try the prisoner after his extradition. The functions of the extradition judge are concluded when there is *prima facie* evidence of an

extradition crime having been committed by the accused, whose identity has been established to his satisfaction.

Judgment.

MacMahon,  
J.

The refusal of the extradition judge to hear evidence in support of an *alibi*, was perfectly proper, and therefore affords no grounds for impeaching the proceedings.

It is unnecessary we should decide the objection urged before us (which appears to have been abandoned by counsel when the prisoner was before my brother Street, under the first writ of *habeas corpus*), that the foreign depositions were not properly receivable before the extradition judge, being taken before a notary public, who was not shown to be an officer of the foreign State seeking the prisoner's extradition.

In the deposition or statement of Mr. Adams, Manager of the City Bank at Vanalstine, which bank cashed the draft alleged to have been forged and uttered by the prisoner, Mr. Adams merely speaks of the amount represented by the forged draft, namely, \$1,500, as having been paid to some person representing himself as James Huntley, the payee thereof. Adams in the deposition makes no statement tending to the identification of the person receiving the money and endorsing the draft.

The evidence of Henry George Ford, a member of the firm of Boughton, Ford & Co., bankers of Burton, Ohio, was taken before the extradition judge. In addition to being a member of the said banking firm, he is National Bank Examiner of the State of Ohio, and as such is acquainted with all the banks in that State. He says there is no such bank or banking firm as Ford, Boughton & Co. (the name of the firm represented as having drawn the alleged draft) at Burton, or in the State of Ohio. He says the draft is a forgery.

Joseph P. House from Vanalstine, Texas, also gave evidence before the extradition judge, and he states that the prisoner stopped at his hotel on the night of the 1st of March last, and that he went with the prisoner to the City Bank of Vanalstine on the morning of the 2nd of March, between eight and nine o'clock; that he saw the prisoner

Judgment. writing on the alleged forged draft, which would be the  
MacMahon, J. endorsation thereon, and the name endorsed is James  
Huntley, and he saw the prisoner receive the \$1,500 on  
the draft, and that the prisoner counted it over twice; that  
after receipt of the money by the prisoner, he went with  
him to the railway station and saw him off on the train at  
9.20 a.m.

House identified the prisoner as being the person that  
received the money from the City Bank at Vanalstine.

There was, therefore, ample evidence by Ford that the  
document uttered was a forgery; and by House, the pris-  
oner was identified as the person charged with having  
committed the offence, without reference to the deposition  
of Mr. Adams, which was not read over to the prisoner as  
forming any part of the evidence against him as required by  
the 70th section of the Criminal Procedure Act, R. S. C.  
ch. 174.

It was urged that House having introduced the prisoner  
to the manager of the City Bank at Vanalstine, and so as  
it were, enabling him to commit the fraud which was per-  
petrated on the bank by the uttering of the forged paper,  
his evidence required to be corroborated under the Crimi-  
nal Procedure Act, R. S. C. ch. 174, sec. 218.

There is no evidence that House is in any way respon-  
sible to the bank by reason of his introducing the prisoner  
to the manager of the bank cashing the draft. House's  
name is in no way connected with the draft by endorsa-  
tion or otherwise. There is, therefore, no evidence that he  
is in any manner interested in the draft.

In *Re Lee*, 5 O. R. 583, Wilson, C. J., held that in  
extradition cases the evidence of interested parties need  
not be corroborated, as he points out that the proceeding  
is not taken with the purpose of sustaining a conviction,  
nor is it taken in support of a prosecution; and that it is a  
preliminary proceeding to determine whether or not the  
party be prosecuted, and if prosecuted, whether he shall  
be convicted.

However, this Division in *Regina v. Hagerman*, 15

O. R. 598, held that the interest of the witness must be apparent on the face of the instrument itself, or arise immediately from the nature of the transaction, or from his own acknowledgment.

Judgment.

MacMahon,  
J.

No interest having been shown to exist in House in the draft or arising out of it, or by his acknowledgment, his evidence, if the prisoner had been prosecuted for forgery here, would not have required corroboration. The evidence of Mr. Ford furnishes ample independent evidence that the draft was a forgery.

The question that arose in *United States v. Rausher*, 119 U. S. 407, and *Re Woodhall*, 4 T. L. R. 532, and was urged before us, cannot again arise, as under the treaty of 1890, between Great Britain and the United States, section 3 provides: "No person surrendered, \* \* shall be triable or be tried for any crime or offence, \* \* other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered."

All the grounds urged before us fail, the writ of *habeas corpus* must be quashed, and the prisoner must be remanded for extradition under the warrant already issued by the minister of justice.

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## [COMMON PLEAS DIVISION.]

IN RE THE CORPORATION OF THE TOWNSHIP OF ANDERDON  
AND THE  
CORPORATION OF THE TOWNSHIP OF COLCHESTER NORTH.

*Drainage—Necessity for petition—Whether new work—Municipal Act, secs. 569, 585, 598.*

On a petition therefor a by-law was passed and the usual proceedings taken for the construction of a drain from a point in the township of C. to the town line between the townships of A. and C., where it connected with an existing drain, whereupon certain landowners on the said town line petitioned the council of C. threatening that if their lands were damaged by the said drain they would hold the township of C. liable therefor, and prayed that they would order the surveyor to continue the drain to a sufficient outlet. Instructions were given to the surveyor, who made the necessary examination, and reported in favour of a drain along the town-line; and a by-law was introduced for the construction thereof, reciting that a majority of the landowners benefited had petitioned (referring to the petition last mentioned), and assessing the cost on the lands benefited, etc., and naming the proportion thereof to be borne by the lands in A. On receiving notice of the proposed by-law the township of A. gave notice of appeal, and arbitrators were appointed. Subsequently the township of A. moved for an order of prohibition forbidding the arbitrators from further proceeding in the matter, on the ground of the absence of a proper petition for such drain :—

*Held, per STREET, J.*, that the drain in question came within either secs. 569 or 598 of the Municipal Act, R. S. O. ch. 184, and not within sec. 585, and that a petition was an indispensable preliminary to the passing of the by-law, whereas the alleged petition was clearly insufficient: that the mere fact of its not being quashed within the period limited by sec. 572, would not prevent its being treated as invalid in other proceedings as here; and that prohibition would be granted, notwithstanding the by-law was good on its face, especially as there had been no laches.

On appeal to the Divisional Court, the Court was equally divided, and the appeal therefore failed.

**Statement.**

THIS was an appeal by the township of Colchester from the judgment of STREET, J., granting a prohibition to certain arbitrators.

The circumstances out of which the question arose were as follow :—Some time in the summer of 1889 a petition duly signed by the landholders of the township of Colchester North was placed before the municipal council praying them to cause a ditch to be constructed on the north side of the road allowance between concessions 13

and 14 of their township. In consequence of this petition *Statement.*  
a by-law providing for the construction of the ditch was introduced on the 10th August, 1889, which by-law was finally passed on the 7th September, 1889. In consequence of the advertising of this by-law a petition signed by certain owners of lands on the town line between Colchester North and Anderdon was sent to the municipal council of Colchester, whereby the petitioners notified the council that in the event of the ditch mentioned in the by-law being made and their lands thereby damaged by water, they would hold the municipal council liable for damage. They then prayed that if such ditch were made that a surveyor should be ordered to continue it to an outlet sufficient to carry away all water so as to save the petitioners' property from all damage from the water of said ditch. There was no other petition from the rate-payers of the township of Colchester North, but in consequence of the so-called petition instructions were given to one James S. Laird, P. L. S., to make a report respecting the cost of the construction of certain works in connection with the drain above referred to, which he did, and whereby he found that the expense would be \$1,332, for which he assessed lands in the township of Anderdon to the extent of \$897. After this report had been received, a by-law, providing for the construction of a drain to take the water to a sufficient outlet, was introduced by the municipal council of the township of Colchester, which recited that "Whereas the majority in number of the owners as shown by the last revised assessment roll of the property hereinafter set forth to be benefited by the construction of Shouel's creek outlet drain have petitioned the council of the said township of Colchester North praying that they would construct a drain to take the water from the 14th concession drain to a sufficient outlet under the conditions of the Consolidated Municipal Act of 1883, and amendments thereto."

Upon receiving notice of this proposed by-law the corporation of the township of Anderdon gave notice of appeal

**Statement.** from the report of the said Laird, and appointed an arbitrator under section 581 of the Municipal Act. The council of Colchester appointed their arbitrator, and the two arbitrators then appointed a third arbitrator. When the arbitrators met objection was taken by the counsel for the township of Anderdon that no petition for the proposed by-law had been filed in accordance with the provisions of the Municipal Act. No petition was produced, and the arbitrators by their award dated 25th September, 1890, allowed the said appeal, and directed that all the costs of the arbitration and award should be paid by the township of Colchester. The township of Colchester then appealed against this award, such appeal being heard before Armour, C. J., and the award was set aside on the ground that the arbitrators had no authority to make such an award as the point on which they had decided had not been referred to them, and the matter was referred back to the arbitrators to make their award upon the matters in dispute between the townships. This order was made on the 9th day of December, 1890. When the case came before Armour, C. J., the instrument referred to as being the petition on which the by-law had been introduced was produced, and was the only petition, as appeared from the affidavit filed in the cause.

Upon this judgment being given, the township of Anderdon caused a notice to be served on the township of Colchester that application would be made for an order prohibiting the arbitrators from further proceeding in the matter of the said arbitration, upon the ground that the said board of arbitrators had no jurisdiction in the said matter to hear and determine the same, by reason that the drainage works contemplated and described in and by the said by-law were never petitioned for by a sufficient number of persons, or at all, as required by the provisions of the Municipal Act in that behalf. Upon this motion coming before Street, J., he granted the order which was the subject of the present appeal.

The following is the judgment delivered by Street, J. : Judgment.

Street, J.

February 19th, 1891. STREET, J.

This was an application by the corporation of the township of Anderdon for an order in the nature of a prohibition directed to the arbitrators appointed in a drainage matter under section 581 *et seq.* of the Municipal Act, forbidding them to proceed with the arbitration upon the ground that the by-law for the construction of the drainage works in question was passed without the necessary foundation of a petition under sec. 569 of the Act.

I have come to the conclusion that the drain in question comes within either sec. 569 or sec. 598 of the Municipal Act and not within sec. 585.

The by-law was practically one providing for the deepening and straightening of the stream called Shouel's creek in order that it might be made fit to carry off the water which the Township of Colchester were about bringing to the neighbourhood of its source by the extension which was then under construction to the eighth lot east of the town-line, of the drain known as the 14th concession drain in Colchester; it was not merely making a new outlet for the short drain across two lots in the 14th concession which had been constructed in 1882, because that short drain appears to have had a sufficient outlet for the water which came into it.

The document under which the proposed drainage works into Colchester was really founded being the petition of 12th September, 1889, signed by John W. Taylor and others shews this, the report of the engineer appears so to treat it, and the by-law in question does not profess to authorize merely the outlet for an existing drain, but the construction of a new work, and recites a petition for the purpose.

Being a work under sec. 569 a petition was an indispensable preliminary to the passing of a by-law, and the petition here is clearly insufficient. It is a protest against water



Judgment.

- J. being brought down to the townline by the proposed new 14th concession drain, and a threat to hold the corporation liable for any damages resulting from it, and a prayer that if they do build the 14th concession drain they will order the surveyor to carry it to a sufficient outlet to prevent damage to the property of the petitioners. The work to be done is not specified nor is the property to be benefited set forth, and the request is conditional: the petitioners do not ask that their property be improved, but only that if the council brings water upon them it will provide means for carrying it away; it is evident they do not contemplate being assessed for the removal of an existing evil; they do not complain of the existing state of things at all.

There being no petition the by-law lacks that which gave the council the power to pass it; and the authorities seem to have established that the mere fact that it has not been quashed within the period limited by sec. 572 is not under such circumstances sufficient to prevent its being treated as invalid in other proceedings. See the cases referred to in *Ostrom and Township of Sydney*, 15 A. R. 372.

The by-law is on its face regular, reciting as it does that a petition duly signed has been presented for the construction of the work; and a difference appears to have been drawn as to the duty of a court in interfering by prohibition between the case of a proceeding regular and one void on its face; in the former case laches on the part of the applicant may prevent the court from interfering, in the latter it should as a rule not do so. This rule, if it exists, seems however to be immaterial here because there has been no laches on the part of the township of Anderdon who have vigorously resisted the execution of the by-law from the time the objection to its validity first came to their knowledge.

The arbitrators here seem to be a body invested with the judicial function of assessing and charging the lands of certain landowners with parts of the cost of the drain in question; or, in the words of Brett, L. J., in *The Queen v. Local Government Board*, 10 Q. B. D. 309, at p. 321,

entrusted by the Legislature with "the power of imposing an obligation upon individuals." See also *Connecticut River R. W. Co. v. County Commissioners of Franklin*, 127 Mass. 50.

Judgment.  
Street, J.

If they are acting under a valid by-law this power belongs to these arbitrators; if the by-law is invalid they are about proceeding to exercise a power which they do not possess.

Being of the opinion that the by-law is invalid, I think it better that they should be restrained at an early period from proceeding to act upon it rather than that they should be allowed to proceed under it, leaving the question to be determined at a later period.

The order should go and the costs of the motion should be paid by the corporation of the township of Colchester North, who are parties to the motion and have appeared to oppose it.

The defendants, the township of Colchester, moved by way of appeal from the judgment directing the prohibition to issue, and that the same should be set aside.

In Easter Sittings, May 22nd, 1891, of the Divisional Court (composed of GALT, C. J., and ROSE, J.), *Langton*, Q. C., supported the motion: *Aylesworth*, Q. C., *contra*.

December 5th, 1891. GALT, C. J.:—

There were two questions discussed before us, (1) As to the necessity for a petition, and (2) as to the right to grant prohibition under the circumstances to which I will presently refer. As regards the first question I fully concur in the opinion expressed by the learned Judge that the drain in question was to be constructed under the provisions of sec. 569, and not under those of sec. 585. It is manifest from the provisions of by-law No. 212, and from the petition in consequence of which such by-law was enacted, that the work therein proposed was done under

Judgment.  
Galt, C. J. the provisions of sec. 569, in which the township of Anderdon had no interest whatever. When by-law 226 was introduced it expressly stated that it was done in accordance with a petition, and it is quite manifest that no such petition had ever been presented. In my opinion, therefore, as the works were done under sec. 569 and not under sec. 585, a petition was absolutely indispensable, and this ground of appeal cannot be allowed.

Then, secondly, as to the question of prohibition. In giving judgment in the case of *The Queen v. Local Government Board*, 10 Q. B. D. 309, at p. 321, Brett, L. J., says: "I think I am entitled to say this, that my view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons other than to the Superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by the Act of Parliament."

There is no doubt that under the provisions of the Municipal Act the arbitrators had authority to make an award on the matter of appeal which had been referred to them.

It was alleged by the counsel for the township of Colchester, on this case being argued, that no prohibition should be issued because nothing had been done after the judgment of Armour, C. J., had been given, and that they had no intention of proceeding further in the matter.

If this be the correct state of the case, the proper course for the township to have adopted would have been to give formal notice to the township of Anderdon that they had no intention of proceeding further with the said reference; but no such notice was given, and as by the terms of the order made by the learned Chief Justice the matters which had been originally referred to the arbitrators were again referred to them, it appears to me the present was the

proper course to be adopted; and that the view expressed by my learned brother Street, that "being of the opinion that the by-law is invalid, I think it better that they should be restrained at an early period from proceeding to act upon it rather than that they should be allowed to proceed under it, leaving the question to be determined at a later period."

Judgment.

Galt, C.J.

This motion must be dismissed with costs.

ROSE, J.:—

This was an appeal from the order of my learned brother Street, prohibiting arbitrators appointed in a drainage matter from proceeding with the arbitration upon the ground that the proceedings were not founded upon a petition.

Early in 1889 a petition was presented to the council of Colchester North, asking for the construction of a ditch on the north side of the road allowance between concessions 13 and 14, from a point near the line between lots 6 and 7 westerly to the line between lots numbers 2 and 3, where, the petition said, such ditch would connect with an old ditch.

Upon such petition such proceedings were taken as resulted in the construction of a ditch from the boundary line between lots 8 and 9 to the townline between Colchester and Anderdon. After such work was determined upon certain parties on the 12th September, 1889, sent in a petition to the council of Colchester North stating that they were the owners of lands on the townline between Colchester North and Anderdon, and calling attention to the fact that there was danger of damage to their lands by overflow in consequence of no sufficient outlet being provided by the ditch referred to. The petitioners threatened to hold the council liable for all damage that their property might sustain by water brought thereon by such ditch, and prayed the council, in case of the ditch being made, to order the surveyor to continue it to a suffi-



Judgment.

Rose, J.

cient outlet. The engineer for Colchester accordingly proceeded to make the necessary examinations, and determined to construct a drain along the east side of the townline between Colchester and Anderdon to Shouel's creek, and thence following the course of the creek to the line between lots 11 and 12 in the 8th concession of Anderdon.

The objection was that this drain along the east side of the townline and the course of the creek was a new work distinct and separate from the drain as mentioned, and that the work could not be executed without a petition.

My learned brother Street was of the opinion that either section 569 or 598 of the Municipal Act applied, and that sec. 585 did not apply.

I am unable to agree to such conclusion.

It seems to me that sec. 585 in terms applies. The council of Colchester North either had constructed or were constructing the drain first mentioned, when, finding that the outlet was insufficient "to prevent damage to adjoining lands, it was deemed expedient," to make a new outlet or otherwise to improve, extend or alter the drain, and this, it seems to me, was what the council was proceeding to have done in taking steps to have the drain constructed along the east side of the townline, and following the course of Shouel's creek, and so it became "necessary to continue the works beyond the limits" of Colchester North. The engineer continued his survey and levels into the adjoining municipality until he found fall enough to carry the water beyond the limits of Colchester North in which the work was commenced, and until he obtained a sufficient outlet for the water as he was empowered to do by sec. 575, the provisions of which were made applicable to sec. 585.

A contrary construction would render Colchester North liable to damages, or require it to close up the drain until such time as a petition presented by the requisite number and otherwise complying with the statute might be presented to the council praying for further work. In other words the council having in good faith constructed a drain

for the relieving of certain portions of the territory of the municipality, it may be, at an enormous expense, and finding the outlet insufficient would be unable to make use of the work already done, or if it was used would be liable for any damages flowing from such user until a petition sufficient under the statute was presented to the council asking for a new and better outlet. From such difficulty I think it was intended to relieve councils by passing sec. 585. Sec. 585, as appears upon the face of it, introduces the provisions of sec. 569 to 582, and so the provisions of 569 were made applicable to a new outlet, but without the necessity of presenting a petition.

Judgment.  
Rose, J.

I cannot agree that sec. 598 applies. I venture to think that that section applies where by the original scheme the works affect more than one municipality.

We of course have nothing to do with the justice or injustice of the assessment. We must assume that Anderdon will not be called upon to contribute to the cost of the construction of the outlet unless under the provisions of the statute it is properly chargeable with such portion of the cost; and we must further assume that no injustice would be done the municipality or any ratepayer of the municipality in the proceedings before the arbitrators.

In my judgment the appeal should be allowed and the order set aside, with the costs of all proceedings to the township of Anderdon.

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## [COMMON PLEAS DIVISION.]

## IN RE THE BANK OF OTTAWA V. WADE.

*Prohibition—Division Courts—Reservation of judgment without fixing day  
—Absence of prejudice.*

The fact that a Division Court Judge has reserved judgment without fixing a day and time for the delivery thereof, is only ground for prohibition when the party applying has been prejudiced thereby, and has not consented to the course adopted, and has not subsequently waived the objection.

Statement. THIS was a motion for a prohibition to the County Judge of Carleton and the clerk of the Fourth Division Court of that county, seeking on behalf of one Gorman, the claimant in certain interpleader proceedings in that Court, to restrain further action for the enforcing of a judgment in favour of the plaintiffs, the Bank of Ottawa.

The facts are stated in the judgment.

December 1, 1891. *C. J. Holman*, supported the motion.  
*Aylesworth*, Q. C., contra.

December 4th, 1891. STREET, J. :—

The grounds alleged are that the learned Judge after the trial of the issue reserved his judgment without fixing a day and time for delivering it, and the judgment lately delivered in *Re Tipling v. Cole*, 21 O. R. 276, is relied upon by the applicant.

It is necessary to point out that the mere fact that the Judge has reserved his judgment without fixing a day and time for the delivery of it, is only ground for prohibition where there is reasonable ground for the conclusion that prejudice may have been caused by the omission to the party applying, and where there has been no consent to the course adopted and no subsequent waiver of the objection.

In the present case it appears from the affidavits filed for the plaintiffs that after the conclusion of the trial the learned Judge, with the consent of the counsel, adjourned the argument to his chambers in Ottawa where, on the 16th May, 1891, the argument took place; the applicant Gorman, his counsel, Mr. Dowdall, and Mr. Dulmage, counsel for the Bank of Ottawa, being all present. At the close of the argument the learned Judge stated to the above persons, all then being present, that owing to the mass of the evidence and to his other engagements he could not then name a time for delivering his judgment, but that he would send it to the clerk when it was ready and would notify the counsel.

Judgment.  
Street, J.

The judgment was delivered to the clerk of the Division Court on the 14th October, and he at once notified the parties by registered letter. The Judge also appears to have written to the counsel that he had delivered it. On the 26th October the defendant's solicitor wrote to the plaintiffs' solicitors saying: "I have just now received copy judgment herein; it was so long Mr. Taylor was late forwarding it. The claimant (defendant) will appeal against the judgment. I must ask you to consent to an extension of one week for the appeal, that is, until Monday 2nd November."

The claimant Gorman, in reply to the affidavits in which these facts are set up, merely swears that he never gave any consent to the postponement of the judgment to a future day, but does not otherwise deny the statements in them; nor does his solicitor, Mr. Dowdall in the affidavit which he has made.

I think I must hold upon this material that the claimant Gorman and his solicitor and counsel Mr. Dowdall being present on the 16th May, at the argument, did then assent and agree to the arrangement proposed by the Judge, that he should deliver his judgment when ready to do so without previously naming a day or time, and this view is confirmed by the terms of the letter of the 26th Oct., in which Mr. Dowdall takes what has happened as a matter of course.



Judgment.  
Street, J.

I do not treat that letter as a waiver of any objections, but merely as affording some corroboration of the fact that the judgment had been delivered in accordance with a previous understanding: *Re Smart and O'Reilly*, 7 P.R. 364.

I think therefore that the prohibition asked for should be refused, and the motion dismissed with costs.

February 4th, 1892.

On appeal to the Divisional Court (composed of GALT, C.J., ROSE, and MACMAHON, JJ.) the judgment was affirmed, the Court holding that the assent of the appellant to the arrangement proposed by the Judge in the Division Court that he should deliver his judgment when ready to do so without previously naming a day or time, took the case out of the rule laid down in *Re Tipling*, 21 O. R. 276, and that it was therefore no ground for prohibition that the provisions of section 144 of the Division Courts Act R. S. O. ch. 51 had not been strictly observed.

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## [COMMON PLEAS DIVISION.]

## GIBBONS V. TOMLINSON.

*Fraudulent conveyance—Conveyance to wife of property purchased by husband—Presumption—Subsequent conveyance by wife—Right of wife's creditors to set aside as fraudulent.*

Whether a conveyance to a wife of property purchased with the money of the husband, is a gift to the wife, is a question of fact, as to which there is no presumption, at any rate in the lifetime of the parties.

Although the object with which a conveyance of property is placed in the name of another may be to protect it against the creditors of the actual purchaser, yet the property belongs to such purchaser, and if in an action to have the grantee in such a conveyance declared a trustee for the true owner, the grantee does not choose to raise such a defence the plaintiff will be entitled to judgment.

The grantee having no interest in the property may convey it to the true owner at any time, and creditors of the former have no right to have the conveyance set aside to obtain that which does not really belong to their debtor.

*Johnston v. Cline*, 16 O. R. 129, dissented from.

*Day v. Day*, 17 A. R. 157, specially referred to.

Decision of FALCONBRIDGE, J., reversed.

THIS was an action tried before FALCONBRIDGE, J., at Statement the Owen Sound Assizes, in the fall of 1890, the plaintiff seeking to set aside a conveyance of land made by the defendant Bella Tomlinson to her father-in-law, the defendant George Tomlinson.

Bella Tomlinson, prior to her marriage with William Tomlinson, which took place in the autumn of 1885, was the widow and administratrix of Lewis Gibbons, who died intestate in June, 1883, leaving him surviving two children, one by Bella Tomlinson, and one by a former wife, the latter claiming to be a creditor of Bella Tomlinson in respect of her share in the estate of her deceased father.

The land in question was purchased in December, 1885, from one Andrew Watt, after the marriage of Bella Tomlinson to her present husband, by the latter with his own money, and he had the conveyance made in his wife's name. Bella Tomlinson at the time of her second marriage was possessed of no property or means, as far as

Statement.

appeared from the evidence, save such interest as she had in her first husband's estate, from which, however, she never realized anything, the estate, or such portion thereof as was not used in paying debts, having gone into the hands of Andrew Watt, who was one of her sureties as administratrix, and who absconded defrauding the estate out of the moneys which he thus obtained. Watt absconded in May, 1888, and on the 21st May the wife executed, at Owen Sound, a declaration of trust in favour of the defendant George Tomlinson, who was a retired farmer. The price paid for the land by George Tomlinson was stated to be \$1,200, and the property was conveyed to him on 21st April, 1890.

The plaintiff claimed that the property in the hands of the wife was available to pay her debts.

The learned Judge reserved his decision, and subsequently delivered the following judgment :—

February 28, 1891. FALCONBRIDGE, J. :—

The deed of 30th December, 1885, from Andrew Watt to Bella Tomlinson, was either a gift to her from her husband, or taken in that way with intent to protect the property against creditors. The husband while denying that it was a gift, says it was done "to please her," while the defendant George Tomlinson says, on his examination for discovery, that his son told him he did it so that if he broke down in the cattle trade, he would "have something to the good."

In the former alternative the relationship of the parties rebuts the presumption of a resulting trust in the absence of clear, satisfactory and credible evidence of a contrary intention. In the latter case I would allow the plaintiff to amend, if necessary, by claiming that the deed was made in favour of the husband's future or possible creditors, and that the defendants cannot set up the wife's alleged trusteeship.

The next step is the declaration of trust of 21st May, 1888. This was executed in Owen Sound immediately after the absconding of Andrew Watt. It is significant that it was never registered, as though it might be produced, if the transaction happened to be attacked before a sale to a *bonâ fide* purchaser for value without notice.

Judgment.  
Falconbridge,  
J.

If the alleged sale to George Tomlinson, perfected by the deed of 21st April, 1890, is a *bonâ fide* transaction, the parties are very unfortunate, for they have surrounded it with every imaginable badge of fraud.

No doubt William Tomlinson first made efforts to find a *bonâ fide* purchaser, but he did not succeed. His reason for wanting the money at the particular time when he sold to his father was purely illusory. The money was not immediately wanted for the purchase of the Belfry farm; only a small sum was actually used for that purpose and that not till long after, and not paid when due under the agreement. There appears to have been no haggling or bargaining about the price. The payment by the son to the father of the \$400 lent money, and the immediate repayment of the same money on account of this purchase has a strange look.

The deed acknowledges receipt of the purchase money, and there is a receipt clause in the margin signed by the grantors, and the deed was registered before the alleged actual complete payment of the purchase money. The account of the parading and paying over of the \$1,100 (or \$1,200 as the female defendant puts it in her preliminary examination) is full of discrepancies both as between the different statements of the parties, and as between the present statements of defendants, and what they said on their examinations before the trial. Then a witness is called to see the payment of the final \$100, and to hear the acknowledgment that the rest of the \$1,200 had been already received.

If this is not a fraudulent transaction, I cannot imagine any case resting on the evidence of the parties attacked which can be found to be fraudulent.



Judgment. The plaintiff is in any event entitled as of course to have  
 Falconbridge, the estate administered by the Court: Haddan's Admin-  
 J. istrative Jurisdiction of Chancery, p. 34.

If it should prove that she has unreasonably exercised this right because she has received all she is entitled to or otherwise, she may be mulcted in costs on final decree.

There will be judgment for the administration of the estate of Lewis Gibbons, and a declaration that the deed made by defendant Bella Tomlinson to defendant George Tomlinson is fraudulent and void as against the plaintiff and the other creditors of Bella Tomlinson, and of the said estate.

The plaintiff will have costs up to the hearing against both defendants, but not to be paid to her until after the decree on further directions. Further directions and subsequent costs reserved.

In Easter Sittings, 1891, the defendants moved to set aside the judgment and to enter the judgment for the defendants on several grounds, the material ones being set out in the judgments.

In the same sittings, June 1st, 1891, of the Divisional Court, (composed of GALT C.J., ROSE, and MACMAHON JJ.), Fullerton, Q. C., supported the motion.

*Lash*, Q. C., contra.

December 5th, 1891. GALT, C. J.:—

This was a motion by Fullerton, Q. C., on behalf of George Tomlinson, to set aside the judgment of FALCONBRIDGE, J., and to dismiss the action as against him on several grounds, but the only paragraphs to which I deem it necessary to refer are the second and third to which I will hereafter allude.

The action as respects George Tomlinson is to have it declared that a deed made by the defendant Bella Tomlinson to the defendant George Tomlinson may be declared to be fraudulent and void as against the plaintiff and the

other creditors of the said Bella Tomlinson, and of the said estate, and may be set aside. The learned Judge before whom the case was tried without a jury had given judgment declaring the said deed to be fraudulent and void. The paragraphs which I have mentioned are: 2nd. The sale to George Tomlinson was a *bonâ fide* sale for valuable consideration and without notice. 3rd. The said judgment is against the evidence and the weight of evidence.

Judgment.  
Galt, C.J.

It is unnecessary for me to state that in arriving at the conclusion I have found, I have carefully considered the evidence, and with all respect to the decision of the learned Judge, I feel constrained to say I see no evidence of fraud on the part of the defendant; and further, that he paid the full purchase money without any notice whatever that his co-defendant Bella Tomlinson and her husband were not in a position to make him a valid conveyance.

The motion must be made absolute.

ROSE, J.:—

My learned brother Falconbridge thought that the conveyance was either a gift from the husband to the wife, or that it was taken in her name with intent to protect the property against the husband's creditors. Whether it was a gift or not is a question of fact, and not a question of presumption.

As said by Lord Justice Lindley in *Ex p. Cooper*, reported in the Weekly Notes, 24th June, 1882, at p. 96: "When the parties to such a transaction are alive, and give evidence, there is no occasion to resort to any presumption; the question is one of fact."

The question of fact here is not what Mrs. Tomlinson meant, but what her husband meant, by the purchase of the property in her name, though the distinction is not material, because if Mrs. Tomlinson is to be believed, she never understood that the property was hers. The fact appears to have been, according to the evidence of both husband

Judgment. and wife, that nothing was said between them as to the  
Rose, J. property being purchased in Mrs. Tomlinson's name until  
after the purchase, when Mr. Tomlinson told his wife that  
he had put the property in her name. This was done to  
please his wife, as the husband says. The husband says  
he never intended to give her the property, and did not  
in fact make her a present of it. Then, as against the  
statement of the husband and wife, what fact is there  
which would lead to the conclusion that the property had  
been given to the wife? It served as their home until  
the sale which is in question, and there is nothing in the  
management of the property which would indicate that it  
belonged to one rather than the other.

In May of 1888, Watt having absconded, William Tomlinson consulted a solicitor as to his position, and fearful lest his wife might have signed papers for Watt creating some financial obligation, he was advised to have her sign a document, which bears date 21st May, 1888, by which she declared that she held the property as trustee for her husband, declaring him to have been the purchaser of the same, and to have paid the purchase money therefor, and agreeing on request to convey the lot to him in fee simple, or to whom he might appoint. As far as this document is evidence, it supports the theory that the property was not a gift. However, I do not deem it to be of much value, because it is equally consistent with the property having belonged to the wife, and the husband being desirous of protecting it against her creditors, as with it having belonged to him and his being desirous of having it placed in such a position as would prevent his wife's creditors from selling it.

My learned brother does not find that it was a gift. He finds in the alternative that it was either a gift or that the conveyance was taken with intent to protect the property against the husband's creditors. I am unable to find that it was a gift. I might suspect that it was the wife's; I might infer that it was the wife's, but it would be a suspicion or an inference in direct contradiction of the

sworn statement of both the husband and wife, and supported alone by the conveyance being in the name of the wife. I think I must find as a matter of fact that the evidence does not show that the conveyance was taken in the name of Mrs. Tomlinson as a gift from her husband.

Judgment.  
Rose, J.

Then the property was the husband's placed in the name of his wife simply to please her, he knowing that when he called upon her to convey she would do so, or the conveyance was so made in order to protect the property against the creditors of the husband. In either of these cases the property was the husband's. In the first case there would be no question but what the wife would have the right to reconvey it to her husband, or as he might direct, and having done so prior to this action it would be manifest that there would be no ground for setting the conveyance aside.

There was some evidence upon which the finding might be rested that the conveyance was made to protect the property against the husband's creditors. The defendant George Tomlinson said on his examination for discovery that his son had told him that the property was placed in the name of his wife so that if he (the son) broke down in the cattle trade "he would have something to the good." No such case is set up by either the husband or the wife in the pleadings, nor was it alleged by the plaintiff. My learned brother stated if that were the proper finding of fact he would allow the plaintiff to amend, if necessary, by claiming that the deed was made in fraud of the husband's future or possible creditors; and further stated that in such event the defendants could not set up the wife's alleged trusteeship. In support of this proposition was cited to us in argument, *Johnston v. Cline*, 16 O. R. 129 where it was held in the Chancery Division by Ferguson and Robertson, JJ., that where a husband had conveyed to his wife property in order to protect the same against his creditors, the wife had an interest in the property which could be made available to her creditors for the payment of her debts, and that a reconveyance by the wife to the



Judgment. husband for the purpose of avoiding the land being seized  
Rose, J. for her debts was in fraud of her creditors, and was void. It was therefore argued that if the finding of fact in this case should be that this conveyance was made in the name of the wife to protect the property against the future creditors of the husband, a conveyance by her, at his request, to avoid the claim by the plaintiff or other creditors of the wife, would be void.

With great respect I am not able to follow the decision in *Johnston v. Cline*. I think it is not in accordance with the principles of the decision in *Day v. Day*, 17 A. R. 157. In that case the Chief Justice of Ontario quoted from *Haigh v. Kaye*, L. R. 7 Ch. 469, at p. 473, as follows: "If a defendant means to say that he claims to hold property given to him for immoral purposes, in violation of all honour and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it."

And the Court held in *Day v. Day*, following *Haigh v. Kaye*, that such defence must be set up by the grantee in which he must admit his own criminality in joining in a criminal act; and further held that if the plaintiff seeking to have the defendant declared the trustee of the lands can make out his case without disclosing the alleged fraud, he can obtain the relief asked.

The principle of the decision, I understand to be, that although the object with which a conveyance of property is placed in the name of another may be to protect it against the creditors of the party who is the actual purchaser, yet the property belongs to the purchaser; and that for the grantee to claim it against him would be in violation of all honour and honesty and an act of scoundrelism.

It is clear, therefore, that not to set up such a claim would be but doing that which was honest; and if in an action brought to have a grantee declared to be a trustee for the purchaser, the grantee did not choose to raise such dishonourable defence, judgment would go for the plaintiff and the property would be revested in the true owner; in

other words that, notwithstanding the form of the conveyance, the grantee had no interest in the property, and that it would be immoral to claim that he had.

Judgment.  
Rose, J.

Now if such a grantee might well admit the trusteeship in an action brought against him, and if not to admit it but to claim to the contrary, would be dishonourable, I do not see why he must wait until an action is brought against him to admit the trusteeship, or why he may not do that which, as between him and the grantor, is the only honourable course, viz., reconvey the property to the purchaser, or make a conveyance to whom he might direct. If such grantee had in fact no interest in the property, then there was no interest which his creditors could have or seize; and, if it would be dishonourable in the grantee to claim the property as against the true owner, I do not see how it would be consistent with honesty that the creditors of the grantee should obtain that which did not belong to the grantee.

I think, therefore, if the proper finding be that this property was placed in the name of Mrs. Tomlinson to protect it against the future creditors of her husband, she was doing what was right in conveying it at her husband's request, and that the plaintiff has no right to ask the Court to set such conveyance aside.

In the view I have taken of the case it does not become necessary to determine whether the father, George Tomlinson, was co-operating with his son for the purpose of placing the property in such a position as would prevent the plaintiff or other creditors of Mrs. Tomlinson from seizing it.

I think, as far as the son William is concerned, the proper finding of fact would be, that he did what he did in obtaining the declaration to be signed by his wife, for the purpose of protecting the property from any claim by any creditor of hers, and probably was anxious to have the property sold so that it might be thus protected. But his conduct is perfectly consistent with the property having been his all along, and with his never intending that it

Judgment.

Rose, J.

should be his wife's, and it is equally consistent with his having had it placed in her hands to protect it from his own creditors. I am not sure, however, that I could agree to what my learned brother found, that the evidence discloses that George Tomlinson was aware of any intention on the part of the son to place the property in such a position as to secure it from any attack from the creditors of Mrs. Tomlinson. My inclination is the other way, and I think I should have to agree with the finding of fact in this respect by the learned Chief Justice. I should not have thought that if the father was privy to such a scheme by the son, he would have taken the trouble that he did with respect to the payment of the money. It would have been just as easy for him to have gone to his son's house with the whole amount and had a stranger present and had receipts passed if he were making evidence. The recital of the facts with reference to the payment of the money seems to me to be natural, and I do not see sufficient in the evidence to warrant me in saying that the defendant George Tomlinson was purchasing the property for the purpose of protecting it against creditors.

On the whole I am of the opinion that the motion must be allowed.

MACMAHON, J.:—

I agree in the reasoning of my learned brother ROSE in the judgment just delivered, and in the conclusions reached therein.

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## [COMMON PLEAS DIVISION.]

## REGINA V. GURR.

*Municipal Corporations—Livery-stable keeper—License to—Restrictions to place mentioned in license.*

A person licensed to keep a livery-stable at a particular locality under a by-law made by the board of police commissioners for a city pursuant to section 436 of the Municipal Act, but not having a cab license for which under a separate by-law other and larger fees were payable, is not at liberty to stand with his cabs and solicit passengers at places though owned by him, other than at the place mentioned in his license.

THIS was an application to quash the conviction of the *Statement*. defendant, who was a licensed "livery driver" but not a licensed "cab driver," for using a cab for hire at another place owned by him but not mentioned in his license without having first obtained a license therefor from the Board of Police Commissioners, of the city of Toronto, who had, pursuant to R. S. O. ch. 184, sub-sec. 436, passed the by-laws mentioned in the judgments. The license granted to the defendant is set out in the judgment of MACMAHON, J.

In Michaelmas Sittings, November 30th, 1891, of the Divisional Court (composed of GALT, C. J., and MACMAHON, J.), *Bigelow*, Q. C., supported the order *nisi*.

The defendant was a licensed livery driver under by-law No. 12, relating to livery-stables, but not a cab driver. The defendant merely solicited passengers on Brown's, his employer's property. The cab by-law No. 11 was not put in, and therefore nothing turns upon it. The case stated by the police magistrate shews that only the livery-stable by-law is in question here. The whole question is whether a livery-stable keeper is entitled to have his cabs at other places than at the place mentioned in the license. The license does not attach to any particular place, except that it is restricted to the city of Toronto. There is nothing to prevent Brown having a livery-stable in one part of the city and stands for his horses in other parts.



## Argument.

*Herbert Mowat*, contra. The license is of only one place, the place specially designated in the license, the livery-stable on King street, which is under the inspection and control of the police commissioners, and it is the only license under the by-law the commissioners could grant. Livery-stables are objectionable, and only allowed in certain localities to be approved of by the license commissioners. The defendant, however, clearly comes within the cab by-law No. 11, and is liable for soliciting passengers at Brown's wharf, a public place within the city without a license under the by-law. By-law No. 11 was certainly put in before the police magistrate.

January 4, 1892. GALT, C. J.:—

This is what may be termed a test case and is of considerable importance not to the defendant, but to his employer Charles Brown, who is a licensed livery-stable keeper. Brown's livery-stable is situate on King street west in the city of Toronto.

The case was briefly stated by the police magistrate as follows:

"It appears that Charles Brown is lessee of Milloy's wharf; the defendant is a driver for Brown. It is contended on behalf of defendant that acting as Brown's agent and upon Brown's property he was not guilty of any infraction of the by-law."

There was also a letter from the police magistrate addressed to Mr. Bigelow:

"The only question intended to be discussed in this case is whether a person having a livery license can stand with his carriages for hire on his own property at places in the city other than where his stable is. It was upon this question I desired a decision of the High Court."

By section 25 of the by-law:

"Every owner licensed under this by-law shall keep or cause to be kept upon his premises a book or books in which he shall enter or cause to be entered the date when the person or persons to whom, and the length of time for which every horse or horses and vehicle is let for hire, the hour of the day or night, as the case may be, when each such horse or vehicle leaves the stables and when the same is returned; when the person or persons hiring any such horse or horses and vehicle are not per-

sonally known, a description of such person or persons shall be entered in such book or books, and such book or books shall be kept open at all times to the inspection of the chief constable."

Judgment.

Galt, C.J.

It is manifest from the foregoing the by-law was intended to apply to the place mentioned in the license and to that place only, consequently this rule must be discharged. If Brown is desirous of using his vehicles as "cabs" he must obtain a license under by-law 11 and his driver also.

MACMAHON, J.:—

The license granted by the City of Toronto to Charles Brown was to keep a livery-stable, and is in the following form :

City of Toronto.

No. 200—Livery-Stable License.

This is to certify that Charles Brown of No. 44 King street west, in the ward of St. Andrew, in the City of Toronto, is hereby licensed to keep a livery-stable in the said city.

This license is to be in force \* \* from the day of the date thereof until the 31st day of December following unless suspended or forfeited.

Provided, nevertheless, that the said Charles Brown shall observe and keep all such laws of the Province and such by-laws, rules and regulations as are now or hereafter may be in force in the said city respecting the owners of livery-stables.

The license is dated the 11th of February, 1891, and is issued by the chief constable by order of the Commissioners of Police.

The 4th section of by-law No. 12 (the livery-stable by-law) gives power to the Board of Police Commissioners to refuse to grant a license to any livery-stable keeper if in the opinion of the board it is undesirable that a livery-stable should be established in the particular locality where the applicant proposes to use his license and carry on his said business. And under section 12, sub-section 4, the chief constable is to examine or cause to be examined the premises, vehicles, etc., of every applicant for a livery-stable license intended to be used thereunder, and to report thereon to the Board of Police Commissioners.

Judgment.

MacMahon,  
J.

These provisions shew that the license when granted is local and attaches to particular premises, being the premises of the intended licensee, which had been inspected and reported upon to the board as suitable for the purpose designed.

The fees payable for a livery-stable and those payable for a cab-license are totally different. For a livery-stable containing three or a less number of horses, a fee of \$10 shall be paid, and for each horse, exceeding three in number, an additional sum of \$2 shall be paid.

Under by-law No. 11 (relating to cabs) the fee payable for each cab drawn by two horses is the sum of \$6, and if drawn by one horse \$4.

I desire to add a word to what has fallen from his Lordship the Chief Justice respecting section 25 of by-law No. 12, to say that it requires records to be kept by a livery-stable keeper which would be impossible in the case of a cabman to keep.

The evidence shews that the defendant was soliciting passengers landing from the steamers at Milloy's wharf; and if the contention of the defendant's counsel were to prevail, Brown, by means of a livery-stable license, could carry on that business on King street; and by renting or purchasing a piece of ground in the vicinity of a railway station or steamboat wharf, could also carry on the business of a cabman with a score of cabs thereon without paying a license therefor.

In the case of *Clarke et al.* (appellants) v. *Stanford* (respondent), L. R. 6 Q. B. 357, a question analogous to that raised here, and upon facts bearing a striking similarity to those in the appeal under consideration, was before the Court for adjudication.

The appellant Clarke was charged with unlawfully plying for hire at the Harrow railway station contrary to 32 & 33 Vic. ch. 115, sec. 7 (Imp.), which provides that: "If any unlicensed hackney or stage carriage plies for hire the owner of such carriage shall be liable to a penalty not exceeding five pounds for every day during which such unlicensed carriage plies."

In that case Clarke (the appellant) was a livery-stable keeper, and he arranged with the London and North-Western Railway Company, whose yard in front of the station at Harrow is enclosed, and is the private property of the company, to supply certain carriages, one term of the agreement being that the vehicles should stand on the premises of the company within the yard to await the arrival of the trains. The appellant's servants who drove the carriages were not to solicit passengers but to wait until called by the servants of the company or hired by the passenger himself.

Judgment.  
MacMahon.  
J.

It was held that the fact that the driver was ready to take up any passenger coming by rail as a fare was sufficient, and that the circumstance that the yard was enclosed and that other hackney carriages were not allowed there made no difference.

Cockburn, C. J., in his judgment, at p. 359, says: "Where a person has a carriage ready for the conveyance of passengers, in a place frequented by the public, he is plying for hire although the place is private property. The public is entitled to travel by railway, and has a right to pass over the premises of the railway to get out, and if a man is standing on these premises with his carriage to take the public, he is plying for hire."

Mr. Bigelow was in error in supposing that by-law No. 11 was not put in at the hearing before the Police Magistrate. By-laws 11 and 12 contained in one book formed an exhibit at the trial.

I agree that the rule must be discharged with costs.



## [COMMON PLEAS DIVISION.]

## REGINA V. ELBORNE.

*Intoxicating liquors—Liquor license Act, R. S. O. ch. 194, secs. 49, 50, 52—  
Lawful sale by druggist—Omission to enter in book, effect of.*

The non-entry in a book of a lawful sale of liquor by a druggist pursuant to sec. 52 of R. S. O. ch. 194 does not constitute an absolute contravention of the Act; but merely throws on the defendant the onus of clearly rebutting the presumption which the statute has raised against him.

## Statement.

THIS was an application on behalf of the defendant to quash a conviction made by the police magistrate of the city of Toronto, "for that he, the said Herbert Elborne, being a druggist, on the 31st August, 1891, unlawfully did sell liquor without recording the same as required by 'The Liquor License Act.'"

The evidence shewed it was the practice of the defendant to keep a record of all such sales on slips of paper, but they were not entered in a book.

In Michaelmas Sittings, November 27th, 1891, of the Divisional Court (composed of GALT, C. J., and MACMAHON, J.), *G. W. Meyer*, supported the motion. *Langton, Q.C.*, contra.

January 4th, 1892. GALT, C. J.:—

In my opinion the conviction must be quashed, the sale was lawful and the offence was the not recording it in a book.

The provisions of the statute under which the conviction was made are contained in sec. 52 of R. S. O. ch. 194, which enacts that secs. 49-50 which prohibit the sale of liquors by unlicensed persons, shall not prevent any druggist from "selling liquor for strictly medicinal purposes and then only in packages of not more than six ounces at any one time

except under certificate of a medical practitioner; *but it shall be the duty of such chemist to record in a book \* \* every sale or other disposal by him of liquor \* \* and in default of such sale or disposal being so placed on record, every such sale shall *prima facie* be held to be in contravention of the provisions contained in the said sections 49 and 50 of this Act.*

Judgment.  
Galt, C.J.

It is manifest from the foregoing that the non-entry in the book shall not be an absolute contravention of the provisions of sections 49-50, but shall throw on the druggist the proof that the sale was lawful. In the present case the sale was lawful; it was made to a person in a quantity not exceeding six ounces, and was admitted by him to be for strictly medicinal purposes as appears by the slip of paper produced at the trial, and this was not contradicted by the witness to whom the sale was made.

It appeared from the evidence it was the practice of the defendant to keep a record of all such sales on slips of paper, which were put on file, but were not entered in a book; consequently as this prosecution has arisen from the defendant disregarding the provisions of the statute in that respect, there will be no costs of the motion.

The conviction must be quashed without costs. There will be the usual order for protection of the magistrate and informant.

MACMAHON, J. :—

I agree that the conviction must be quashed.

By the 52nd sec. of "The Liquor License Act" a druggist may make sales of liquor for purely medicinal purposes in quantities of six ounces or less without the certificate of a medical practitioner. "But it shall be the duty of such chemist or druggist to record in a book, to be open to the license commissioners or inspector, every sale or other disposal by him of liquor, and such record shall shew as to every such sale or disposal, the time when, the person to whom, the quantity sold. \* \* and in default of such

Judgment.  
MacMahon,  
J.

sale or disposal being so placed on record, every such sale or disposal shall, *primâ facie*, be held to be in contravention of the provisions contained in the said sections 49 and 50 of this Act."

What is the effect of *primâ facie* evidence was considered by the Supreme Court of the United States in *Kelly v. Jackson*, 6 Pet. 622, where it is said, at p. 631: "It is such evidence as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose."

So that where an entry of a sale is not made in a book as prescribed by the Act, the defendant is required to rebut the presumption thus created that such sale was in contravention of the Act. And where a chemist or druggist is found systematically disregarding the requirements of the statute by not recording sales as directed by the Act, it should require the clearest proof to rebut the presumption which the statute has raised against him.

*Conviction quashed without costs.*

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## [COMMON PLEAS DIVISION.]

THE ATTORNEY-GENERAL ON THE RELATION OF RUSSELL  
AND THE MUNICIPAL CORPORATION OF THE TOWNSHIP  
OF VAUGHAN, PLAINTIFFS, AND THE VAUGHAN ROAD  
COMPANY, DEFENDANTS.

*Way—Road companies—General Roads Companies Act—Provisions as to  
tolls—Applicability to private road company—53 Vict. ch. 42 (O.)—  
Attorney-General—Right to maintain action.*

The provisions of the General Road Companies' Act, R. S. O. ch. 159, relating to tolls, taken in connection with 53 Vict. ch. 42 (O.) apply to a road company incorporated by special Act, so as to prevent the company from demanding tolls after the engineer appointed under 53 Vict. ch. 42 (O.) has reported the road to be out of repair, until he further reports that the road has been put in good and efficient repair; and an action will lie at the suit of the Attorney-General to restrain such collection, [Reversed by the Court of Appeal.]

THIS was a motion for an injunction restraining the <sup>Statement</sup> defendants from collecting tolls, alleging as a reason the non-compliance by the defendants with certain requisitions respecting repairs made by Mr. Gibson, an engineer appointed by the county of York, under the provisions of 53 Vic. ch. 42 (O.)

In Michaelmas Sittings, November 23rd, 1891, before a Divisional Court composed of GALT, C. J., and MACMAHON, J., *Lawrence* supported the motion.

[The learned counsel discussed the various statutes relating to road companies, and which are fully set out in the judgment, and proceeded:] The Act 53 Vic. ch. 42 (O.), passed in 1890, clearly applies to the defendant company. The proceedings are taken under this Act. The certificate of the engineer was obtained, shewing the road to be out of repair, which was duly served on the defendant company, and fixing a limited time to put the road in repair, and until the road was put in proper repair the right to take tolls ceased. The com-



Argument.

pany in the face of this are attempting to take tolls, and therefore should be restrained by injunction from so doing. The action for the injunction is properly brought by the Attorney-General: *Attorney-General v. Niagara Falls, etc., Tramway Co.*, 19 O. R. 624; *Attorney-General v. Niagara Bridge Co.*, 20 Gr. 34, 52. The want of repair constitutes a nuisance and is also a matter of public interest.

*Kappele contra.* The defendant company is not subject to the General Road Companies' Act. Certain sections of the General Road Companies' Act are made to extend to companies having a special charter, and apply to the defendant company, but this does not make the defendants' road subject to the General Road Companies' Act within the meaning of section 2 of 53 Vic. ch. 42 (O.) 53 Vic. ch. 42 is not applicable, and the proceedings under it are therefore of no effect as against the defendant company. If the Act is applicable, the only remedy against the defendant company is by indictment and that given by the statute itself, and there is no remedy by injunction: *Regina v. Ottawa and Gloucester Road Co.*, 42 U. C. R. 478. The action is improperly constituted. There is no cause of action shewn in the Attorney-General. The Attorney-General only has jurisdiction on grounds of public nuisance, and the proceedings under which it is alleged the defendant company have no right to collect tolls do not constitute a public nuisance, or give any cause of action to the Attorney-General. There is no forfeiture of the right of property of the defendant company, but the effect of the proceedings is simply the suspension of tolls: *Attorney-General v. Weston Plank Road*, 4 Gr. 211; *Regina v. Trustees of the Oxford Turnpike, etc., Roads*, 12 Ad. & E. 427. The statute 53 Vic. ch. 42, interfering with vested rights, must be construed strictly: *Seward v. Vera Cruz*, 10 App. Cas. 68; *Ex p. Rossmore*, 8 Ir. Rep. Eq. 366; *Clarke v. Bradlaugh*, 8 Q. B. D. 69; *Dudley Gaslight Co. v. Warmingtton*, 44 L. T. N. S. 475.

January 4, 1892. GALT, C. J.:—

Judgment.

Galt, C.J.

This motion, which is of considerable public interest, was very fully argued by Mr. Lawrence for the plaintiffs, and Mr. Kappele for the defendants.

It is unnecessary to refer to the very voluminous affidavits used on the argument, the simple question being whether the defendants are liable under the Act referred to, for if they are, unquestionably the requisitions of the engineer, whether reasonable or not, have not been complied with. In order to arrive at a conclusion on this point, it is necessary to trace the course of legislation.

The first statute authorizing the formation of joint stock companies for the construction of roads and other works in Upper Canada, is 12 Vic. ch. 84. In the preamble it is stated that owing to the "delay and expense incident to the obtaining a special Act of Incorporation from the legislature for each separate company:" etc. "Therefore," etc. \* \*

It is plain from the foregoing, it was the intention of the legislature that the provisions of the Act should apply only to such companies as were formed under it, and had no bearing on any road company incorporated by a special Act, as it was to avoid the expense of procuring such Act the statute was passed.

The next is 13 & 14 Vic. ch. 14, extending the provision of the former to companies formed for the purpose of purchasing public works. It was in the same year, viz., 1850, the defendants obtained their special Act, 13 & 14 Vic. ch. 134, in which no reference is made to the Act of 12 Vic.

The next public Act is 16 Vic. ch. 190, which repeals the two former Acts, but again refers to the expense of obtaining special Acts, and recites "that a new Act should be passed, placing all roads, whether constructed by companies formed under authority of any of the *aforesaid* Acts, or to be formed under the authority of *this* Act, or constructed or acquired by companies or municipalities by

Judgment.

Galt, C.J.

purchase, except as hereinafter provided with regard to roads having private Acts of Incorporation." It then by the 59th section enacts that the sections therein mentioned shall also extend to road companies having private Acts of Incorporation; but that no other sections of this Act shall apply to such companies. These sections are: 6, 7, 8, 9, 10, 11, 12, 19, 20, 21, 22, 23, 24, 25, 26, 28, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 57, 58. It is plain that after this Act was passed the above sections are to be treated as incorporated in the Act of the present defendants. The sections bearing on the question now before us are the 34, 35 and 36.

The next statute is the Consolidated Statutes of Upper Canada, 1859, ch. 49, in which the above sections 34, 35, 36, are consolidated as sections 85, 86, 87, and 88.

The next statute is 23 Vic. ch. 54, which amends the law contained in the above sections 85, 86, 87, 88.

Then follows 35 Vic. ch. 33, sec. 10 (O.), which enacts that sections 84, 85, and 86, Consol. Stat. U. C., ch. 49, the Act 31 Vic. ch. 31 (O.) (to which I have not referred as it did not apply to defendants), "and the provisions of this Act shall apply to all toll roads whereon tolls are levied and collected in the Province of Ontario, whether said roads are constructed under the Joint Stock Road Companies' Acts, and the amendments thereto, or under any *special* charter, or toll roads which may have been purchased from the Government of the late Province of Canada and now being owned and held by private companies or municipal councils;" and by section 11, "all Acts and parts of Acts inconsistent with any of the provisions of this Act, are hereby repealed."

Then comes the R. S. O. (1877), ch. 152, which by sec. 127 enacts that, "The sections of this Act, numbered from 98 to 126 inclusive, shall apply to all toll roads whereon tolls are levied and collected, whether such roads were constructed under this Act, or under any of the Acts in the second section mentioned, or *under any special charter*." It is unnecessary to refer to these sections in detail, they

are under the heading "Tolls on roads," etc., and provide what is to be done in case a road is alleged to be out of repair.

Judgment.  
Galt, C.J.

These provisions were re-enacted by R. S. O. 1887, ch. 159: "The General Road Companies Act," and by sec. 128, are made applicable to the defendants.

Then in 1890, an Act, 53 Vic. ch. 42 (O.), was passed to amend "The General Road Companies' Act." It was under the provisions of this Act the proceedings were taken, which have led to this motion. It appears to me that so far as the question of law is concerned (I mean as to whether the defendants are subject to the provisions of the Act in question), they are clearly so under the express enactments to which I have referred, and which are specially declared to be applicable to all toll roads, whether they were constructed under the General Act, or by companies holding special charters.

Mr. Kappele contended that, as this is a question of nuisance, it should be sent for trial.

I cannot accede to this proposition. The statute has, by sec. 7, expressly declared that in cases where the engineer has reported the road to be out of repair, "the directors shall not demand or take any toll from any person travelling on those portions of the road, until the engineer has again examined the road and certified it to be in good and efficient repair."

An injunction is granted to continue until the engineer has given his certificate as provided by the statute, and with costs.

MACMAHON, J. :—

All the statutes bearing on the motion have been referred to and fully analyzed in the judgment of His Lordship the Chief Justice.

The 13 & 14 Vic. ch. 134, is the special Act by which the defendants were chartered as "The Vaughan Road Company" and provides that the company may utilize



Judgment.  
MacMahon,  
J.

certain public highways in the townships of Vaughan and York as part of the macadamized and plank road they were by the charter authorized to make.

The contention is that sections 34, 35 and 36 of the 16 Vic. ch. 190 (now virtually embodied in the General Road Companies' Act R. S. O. ch. 159, secs. 101 and 102, sub-secs. 1 and 2, sec. 105, sub-sec. 1, and sec. 108), do not apply to the defendant company. As pointed out in the judgment of the learned Chief Justice by sec. 128 of the General Road Companies' Act (R. S. O. ch. 159), the sections "from 99 to 127 inclusive shall apply to all roads whereon tolls are levied and collected whether such roads are constructed under this Act \* \* or under any special charter," etc. So that the defendant company comes under the General Act and the amendments made thereto by 53 Vic. ch. 42 (O.).

The relators proceeded under 53 Vic. ch. 42, by causing a requisition to be presented to Mr. Gibson, county engineer, as provided by section 3, stating that the road is so much out of repair as to impede or endanger Her Majesty's subjects or others travelling thereon.

The County Engineer having examined the road and found it out of repair, as stated in the requisition, he notified the president of the company to cause the road to be repaired within a time named in such notice and not having found the road properly repaired within the time limited the directors were by the terms of the Act precluded from continuing to demand or take tolls from persons travelling over the road.

The directors of the company did not take the proceedings mentioned in section 104 of the General Act, disputing their road being so out of repair. Nor does it appear they had placed themselves in a position to institute the proceedings mentioned in section 111; as such proceedings were not resorted to.

Holding, as we have done, that the relators have made out a case shewing that the defendant company is not entitled to demand or collect tolls from those travelling over the road, the other question to consider is whether this is

a case where the public interests are of that character that the Attorney-General should intervene and ask to have the collection of tolls restrained by injunction. Judgment.  
MacMahon,  
J.

In *Attorney-General v. Weston Plank Road Co.*, 4 Gr. 211, it was held that the Court had no jurisdiction on the ground of a public nuisance to enforce by injunction the ordinary repair of a highway, or to restrain an incorporated company from suffering a road to continue out of repair; assuming such a jurisdiction to exist, the Attorney-General did not appear to be a proper party. See also *Regina v. Trustees of the Oxford, etc., Turnpike Roads*, 12 A. & E. 427, where it was held the only remedy was by indictment. But in *Regina v. Ottawa and Gloucester Road Co.*, 42 U. C. R. 478, it was held that roads incorporated under 16 Vic. ch. 190 (now R. S. O. ch. 159) are not subject to indictment for not keeping their road in repair where the liability to repair is admitted; the special remedies given by the Act must be resorted to. But where the dispute is whether the part out of repair is part of defendants' road, an indictment will lie.

Gwynne, J., in giving judgment in that case, at p. 489, says: "The Act provides a graduated scale of forfeiture of the right to levy tolls in proportion to the length of time the road shall be suffered to remain out of repair, culminating in the total forfeiture of the franchises and property of the company, if the default should be suffered to continue for a specified time."

It is not sought in this case to enforce by injunction the repair of a highway, as was aimed at in *Attorney-General v. Weston Plank Road Co.* But the company by retaining the road in a condition dangerous to the public requiring to travel over it and found to be so by the authority authorized by the Act to adjudicate in the matter, namely, the county engineer, and by such adjudication the forfeiture of the right to levy tolls being thus established, the enforcing of payment of tolls by the company is doing an act expressly forbidden by the statute, and which is an injury to the general public using the road. In such a case

Judgment. I have no doubt the Attorney-General is entitled to have  
MacMahon, the defendants enjoined from doing the act thus forbidden  
J. to be done, and to protect the public from the injury  
occasioned thereby.

I agree that the injunction must go restraining the collection of tolls with costs.

[Reversed by the Court of Appeal.]

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## [CHANCERY DIVISION.]

## RE CENTRAL BANK.

## CANADA SHIPPING COMPANY'S CASE.

*Banks—Advance of money by, under sec. 53, sub-sec. 4 R. S. C. ch. 120—Bill of lading—Promise to transfer—Acquisition of—Goods attached by process in foreign country before bills of lading delivered—Conflict of laws—“Acquire”—“Hold”—Meaning of.*

A bank in this Province, under an agreement with a customer, domiciled here, advanced money to him to enable him to buy cattle in this Province which, under the agreement, when purchased, were to be forwarded by rail by him to Montreal, and to be shipped by steamship thence to Liverpool, the bank having no control over the cattle until they reached the vessel, when they were to be received by the steamship for the bank, and the customer's possession and control over them was to end; bills of lading therefor in favour of the bank being then signed. The cattle were purchased and sent to Montreal as agreed on. On arriving at the steamship, and before the bills of lading were made out, a creditor of the customer attached the cattle under a writ of *saisie-arret*, but the steamship owners, disregarding the writ, signed the bills of lading and conveyed the cattle to their destination. The creditor subsequently recovered a judgment for the value of the cattle, in the Province of Quebec, against the steamship owners, which the latter having paid sought to prove on the estate of the bank in winding up proceedings, but the claim was disallowed by the Master.

On appeal from him it was :—

*Held*, that, apart from the Banking Act, R. S. C. ch. 120, by virtue of the agreement between the bank and its customer the possession and a special property in the goods passed to the bank, of which the steamship owners were aware, and having assented thereto upon receipt of the cattle, before any process was served, must be taken to have held the cattle for the bank.

The agreement having been made, and the parties to it being domiciled in this Province, the rights of the parties to it must be determined by the laws of this Province and not those of Quebec, which, however, were not shewn to be different :—

*Held*, also, that the rights of the parties were entirely governed by the provisions of the Banking Act and following, though not altogether approving, *Merchants' Bank v. Suter*, 24 Gr. 356, that under sec. 53, sub-sec. 4 of the Act, the bank had, under the agreement and the facts proved, an equitable lien upon the cattle from the time of the making of the agreement, which prevailed over the attachment.

*Held*, lastly, that the bank “acquired” the bills of lading within the meaning of the Banking Act as soon as the cattle were received by the steamship, although it did not at that time actually “hold” the bills. The appeal was therefore dismissed.

THIS was an appeal by the Canada Shipping Company *Statement.* against a finding of the Master-in-Ordinary who had disallowed a claim which the company sought to prove against



**Statement.** the Central Bank of Canada under the winding-up proceedings of that bank.

The claim against the bank was for the sum of \$4,638.33, being the amount of a judgment by one Fraser against the company in the Superior Court for the Province of Quebec.

Fraser being the holder of a judgment in said Court against one Patrick Bonner, on the 10th October, 1887, issued a writ of *saisie-arret* or garnishment against the company to hold any goods then in their possession belonging to Bonner.

Bonner, who resided in this Province, had made an arrangement with the bank here under which the bank had advanced him the money to purchase the cattle in question for exportation to England, which on being shipped at Montreal on the ocean steamship belonging to the company, the bills of lading therefor were to be transferred to the bank. After the cattle were received at the ship, but before the bills of lading were made out, the writ of *saisie-arret* or garnishment was served; the company, however, forwarded the cattle to England as instructed by the bank. At the trial in the Quebec suit the Judge found that the bank had made the advances to Bonner on the condition that the bill of lading should be transferred as security for the advances; but that by virtue of the seizure by garnishment before the bills of lading were made out, the seizure prevailed against the bills of lading, and he gave judgment in favour of Fraser against the company, which the company paid, and now sought to prove against the bank.

The learned Master considered that he was bound by the decisions of the Courts of this Province in the cases of *The Queen v. Gamble and Boulton*, 9 U. C. R. at p. 554, and *Saul v. Creditors*, 8 Martin (La.) 665, to dissent from the conclusions of the Quebec Judge, and found under the facts proved and the cases of *The Royal Canadian Bank v. Ross*, 40 U. C. R. 466; *McMaster v. Garland*, 8 A. R. 1, and *Dominion Bank v. Davidson*, 12 A. R. 90, that the

bank had an equitable title to or lien on the two lots of <sup>Statement.</sup> cattle shipped on the 11th and 18th October, 1887, for the advances made to Bonner on his promise as proved; that Bonner's execution creditor, Fraser, could stand in no better position and have no greater rights as against such equitable title or lien than Bonner himself, and that the bills of lading in question when acquired by the bank, perfected the equitable title or lien and vested the legal title to the cattle in the bank as against Fraser's execution, and the garnishee proceedings under the writ of *saisie-arret*; and he disallowed the claim of the company.

From this finding the company appealed, and the appeal was argued on 29th October, 1891, before MEREDITH, J.

Moss, Q. C., for the appeal. The effect of the writ of *saisie-arret* served was, by virtue of the Quebec Code, to compel the company to hold the cattle for the plaintiff in the Quebec suit, and if they did hold them to make them the debtor's. The company communicated with the bank, and the result of the instructions received was that the company forwarded the cattle for the bank, and the bank received the money for them. The company have been held liable in the Quebec Court and now only seek to recoup themselves. The Quebec Judge could not find, on the evidence, that there was any *promise* to give the bills of lading even if there was an intention. The onus of proving the promise is on the bank, and it was not proved. The learned Master seems to have undertaken to accept the finding of fact of the Quebec Judge while he rejects his finding of law. The Master finds that the *lex fori* should govern, while the company contends the *lex rei sitæ* should govern. The bank could not acquire the bills of lading because they were not negotiated at the time of the advances, and no promise to give them is proved: R. S. C. ch. 120, sec. 53. and sub-sections. The service of the writ preceded the making out of the bills of lading, and so the garnishment by the writ prevailed. By

## Argument.

the civil law the right of a creditor to the goods of the debtor attaches before delivery, even although the purchase money is paid: Wharton's Conflict of Laws, 2nd ed., par. 334, *et seq.* The service of the writ divested the property in the cattle from Bonner and vested it in those in whose possession they were for the benefit of Fraser: Wother-spoon's Manual of the Code of Civil Procedure of Lower Canada, p. 87, par. 612 and 613. I also refer to *Olivier v. Towns*, 7 Martin (La.) 50, and *Ambrose Lanfleur v. Charles P. Sumner*, 17 Mass. 109.

*Meredith*, Q. C., contra. The plaintiffs' statement of claim makes an express admission that at the time of the service of the writ the cattle were in the possession of the company with express instructions to send the bills of lading to the bank. The goods were therefore virtually in the possession of the bank. The evidence shews that the bank really delivered the cattle to the company. The cattle belonged to the bank, and Bonner was merely the hand by which they were sent forward. The bank and Bonner were domiciled in Ontario, and the contract was made here and should be governed by Ontario law: Westlake's Private International Law 3rd ed., par. 150. The goods were in transit, and Montreal, the place of seizure, could not be the *situs*. The evidence shews a distinct promise to give the bills of lading, made at the time of the advances by the bank: R. S. C. ch. 120, sec. 53, sub-sec. 4.

*Moss*, Q. C., in reply.

December 1, 1891. MEREDITH, J. :—

Dealing with the matters in question apart from the provisions of any statute affecting them, the claim, in my opinion, would fail, for it must, in such case, be held that, upon the facts proved, the bank, at the least, acquired some interest in the cattle, when placed on board the steamship, good against the debtor and the company; that, by agreement between the bank and its customer, the debtor, the

possession and a special property in the goods passed to Judgment. it; and that the company being notified, and aware of, and Meredith, J. assenting to it, and receiving the cattle under it, before service of the process in question, held them for the bank.

Thus dealt with, it was not, and reasonably could not be, contended that according to law, as administered in this Province, the right and title of the bank to and in the goods could be superseded by any process that might be issued against the debtor, without the aid of some statute such as the Chattel Mortgage Act, if applicable.

But it was contended that a different rule prevailed in the Province of Quebec, and that the law of that Province must prevail; and it was urged that because under the civil law, no matter how perfect the bargain, and although the whole price were paid, a vendee of goods, without actual delivery, had only the *jus ad rem*, not the *jus in re*; and that where that law prevailed, as in some of the United States of America, it had been held that process against the vendor prevailed over the right of the vendee; and because the Civil Code of that Province is founded upon the civil law, this Court must take the long jump to the conclusion that rights, such as the bank had acquired to these cattle, are not respected, but are over-ridden by the process in question, in the law of that Province; and that the naturally just rule prevailing here—that, in the absence of any statute otherwise providing, an execution creditor takes no higher or greater right than that which his execution debtor had at the time of seizure—cannot be given effect to.

But it is not to be presumed even that the law of that Province differs from that administered here. If there be any difference it was incumbent upon those who assert it to establish the fact, by proper evidence, like any other fact; and until so proven the case must be dealt with as if there were no difference—according to law as administered here.

There is some evidence as to the law of that Province, evidence which the company cannot well object to, having



Judgment. been elicited from its own witness, one of the attorneys  
Meredith, J. who issued the process, and who was counsel for the plaintiff in and throughout the garnishee proceedings; and that evidence does not make for but against the contention in that respect, made in the company's behalf; it is this:

That there are sections in the Civil Code of the Province of Quebec respecting privileges and liens; and that if the cattle were the property of the bank, or if it had a just lien or privilege on them to an amount sufficient to cover the whole value of them, the plaintiff in the garnishee proceedings would have failed.

It was not claimed that the lien or privilege, if the bank had any, was insufficient in amount to cover the whole value; no claim was or is made to any interest of the debtor in the goods subject to the bank's claim: there was no question as to that; the real and only question was and is, whether the bank had any right or title at all to the cattle as against the attachment.

And if all this were not so, it must, under all the circumstances bearing upon this question, be found, as a fact, that it was the intention of the parties—the bank and its customer—to the agreement that it should be governed by the laws of this Province, the Province in which the agreement was made, and in which the parties to it were domiciled and chiefly carried on business, and therefore *primâ facie* which, it would seem, are applicable.

See *The Duero*, L. R. 2 Adm. 393; *Jacobs, Marcus & Co. v. The Credit Lyonnais*, 12 Q. B. D. 589; *Re The Missouri Steamship Co., Munro's Claim*, 61 L. T. R. N. S. 316; *In re Queensland, etc. Co.* [1891] 1 Ch. 536; and *Chatenay v. The Brazilian, etc., Co.*, [1891] 1 Q. B. 79.

So that, according to the law governing the contract, the bank had not only a right to the goods but a property in and the possession of them; and it was not contended as against such rights the writ *saisie-arret* was effectual.

But the rights of the parties are, in my judgment, confined to much narrower limits; are to be found in, and governed by, the provisions of the Bank Act then in force.

By that Act banks were prohibited from, among other Judgment. things, either directly or indirectly, lending money or Meredith, J. making advances upon the security or pledge of any goods, except as authorized in the Act; and from either directly or indirectly dealing in the buying, selling, or bartering of goods, or engaging, or being engaged, in any trade whatsoever except as a dealer in gold and silver bullion, bills of exchange, discounting of promissory notes and negotiable securities, and in such trade generally as appertains to the business of banking.

But were authorized to acquire and hold any warehouse receipt, or bill of lading, as collateral security for the payment of any debt incurred in its favour in the course of its banking business, which, so acquired, should vest in the bank, *from the date of the acquisition thereof*, all the right and title of the previous holder or owner thereof, or of the person *from whom the goods were received* or acquired by the bank, if the warehouse receipt or bill of lading were made directly in favour of the bank instead of to the previous holder or owner of the goods, but, it was provided, that the bank should not acquire or hold any warehouse receipt or bill of lading to secure the payment of any bill, note, or debt unless such bill, note, or debt was negotiated or contracted at the time of the acquisition thereof by the bank, or *upon the promise* that such warehouse receipt or bill of lading *would be transferred* to the bank.

Apart from this authority in the Act the bank could not have acquired any right or title to the goods in question; and the dealings between it and the debtor were no doubt framed and carried out in view of this. The transaction was therefore a loan to the customer for the purpose of enabling him to buy the cattle: the money was to be used for that purpose only: the cattle so purchased were to be forwarded, by rail, by him, and he was to make all necessary arrangements for their transport from Montreal to Liverpool; saving the bank all trouble in the matter until they were on shipboard, and getting the advantages, in

Judgment. the carriage and in regard to freight, of an extensive  
Meredith, J. drover and exporter: the bank taking no right or title to the goods until they reached the steamship, when and where they were to be received by the company for the bank, and the customer's possession and control over them to end, and the bank's begin: and the cattle in question were thus purchased, and conveyed to, and received by, the company.

So that this branch of the case is, in my opinion, reduced to the question: whether, under this enactment, the bank acquired any right and title to the goods in question before the process attached.

I would have thought, in the absence of any authority upon the question, that, under the provisions of this Act, the bank could have no right or title to the goods until, at all events, they became entitled to the bill of lading, for the right and title are to "vest in the bank from the acquisition" of the bill of lading; and, looking at all the provisions of the Act bearing upon the question, in its former as well as in its amended state, is it not reasonably clear that the intention, in making the amendment, was not to give the bank power to acquire any right or title to goods, wares, or merchandize at the time of the promise, or at any time before the acquisition of the bill of lading, but to put the consideration of a pre-existing debt, made upon a promise to transfer, on a footing with, and as effectual as, a debt contracted or bill or note negotiated at the acquisition?

But it is said that I am precluded by authority binding upon me from giving effect to such a view of the Act; or, as the Master-in-Ordinary has put it in his reasons for rejecting the claim in question, that the authority of decisions in our Courts bind him to dissent from the conclusions of Mathieu, J., that the owner's title to the goods vested in the bank only from the date of its acquisition of the bill of lading; and to hold that the bank had, by reason of the promise and upon the facts proven, an equitable lien upon the cattle from the time of the making of the promise.

I am unable to find, however, in any of the cases referred Judgment.  
to in his reasons, and none other were cited upon the Meredith, J.  
argument before me, anything requiring such a conclusion.  
In such of them as deal with rights under the Bank Act,  
the warehouse receipt or bill of lading had been acquired,  
and was held, by the bank, before the bank's rights were  
questioned, and so are no authority for the conclusion  
that the bank had any right or title prior to such acquisition.  
Whilst the other cases deal with the question apart  
from the provisions of the Act altogether, a question about  
which, as I have already said, there was not and could not  
be, under the law of this Province, any serious contention  
before me.

But in the case of *Suter v. The Merchants' Bank*,  
24 Gr. 365, the V. C., Proudfoot, seems to have come to  
a conclusion opposed to that which, but for it, would  
have seemed to me the meaning of the Act and the intention  
of Parliament in passing it. In that case there was a  
promise of warehouse receipts—as there was here of the  
bill of lading—of the blue shirts and drawers; but the  
receipts were not given until within the prescribed thirty  
days next before the making of the assignment in insolvency;  
and that learned Judge in determining that the bank was  
entitled to the goods as against creditors represented by  
the assignee under the Insolvent Act, said, at p. 374 :

“It was argued, however, that the defendants could not  
acquire by anticipation a property in a non-existing receipt:  
34 Vic. ch. 5, sec. 47, (D.). That section enacts that ‘No  
transfer of any such bill of lading, specification of timber,  
or receipt, shall be made under this Act to secure the  
payment of any bill, note, or debt, unless such bill, note, or  
debt be negotiated or contracted at the time of the acquisition  
thereof by the bank, or upon the understanding that  
such bill of lading, etc., would be transferred to the bank,  
but such bill, note, or debt may be renewed or the time  
for the payment thereof extended, without affecting such  
security.’



Judgment. “The first part of the section applies where the receipt, etc., is in the hands of the debtor, but the latter part seems to contemplate just such a case as this. I do not suppose it was intended only to apply when the receipt had been given, but was not yet come to the hand of the debtor. One object of the Act was apparently to secure the aid of bank capital in furthering the great industries of the country, the lumbering, the agricultural, and the manufacturing; and these would obviously be very imperfectly benefited, if they could not get advances from the banks till the whole cost of production had been incurred. In the case before me the money was wanted to work up the raw material and prepare it for market, and it appears to me the transaction is one contemplated by the Act.”

It seems to me that the point in question is covered by that deliverance, and that I should follow it.

To “acquire by anticipation a property in a non-existing” bill of lading, it seems to me, must be to acquire by anticipation some right or title of the previous owner to the goods, of which it is but the symbol, before the date of the acquisition of the symbol.

I refer—in addition to the cases to which reference has already been made—upon the question as affected by the provisions of the Act, to *Bank of British North America v. Clarkson*, 19 C.P. 182; *The Royal Canadian Bank v. Miller*, 28 U.C.R. 593, and 29 U.C.R. 266; *The Royal Canadian Bank v. Carruthers*, 29 U.C.R. 283; *Molson's Bank v. Janes*, 9 L.C.Jur. 81; *McCrae v. Molson's Bank*, 25 Gr. at p. 521; *Dominion Bank v. Oliver*, 17 O.R. 404-8; *The Bank of Hamilton v. The John T. Noye Manufacturing Co.*, 9 O.R. 631; *The Bank of Toronto v. Perkins*, 8 S.C.R. at p. 610, and *Thompson v. The Molson's Bank*, 16 S.C.R. 664; and, apart from the provisions of the Act, and also upon the findings of fact: *Molson's Bank v. Girdlestone*, 44 U.C.R. 54.

Apart from a disposition of this appeal upon this ground, I was upon the argument, and yet am, inclined to think that it would have failed upon another ground.

The fact being found that the company received these goods for the bank, and as the bank's property, under the agreement before mentioned; and the bank being entitled, as against both the previous owner and the company, to the bill of lading, before the process attached, it may be said that the bank had "*acquired*" the bill of lading, within the meaning of the Act, although it did not then actually "*hold*" it.

Or, to put it in another way, that the bill of lading took effect from the time when the bank became entitled to it: as soon as the cattle were received by the company; and that the bank cannot be prejudiced by the delay in the manual operation of filling up the form and signing and delivering of the completed bill.\*

The position of the parties in point of fact, even if open to question upon the evidence otherwise, is put beyond question by the company, being iterated and reiterated in their declarations and pleadings in the Quebec Courts, in the depositions of their manager in the action there, and in their claim in this matter, thus:—

"The cattle were delivered to the Shipping Company as the property of the Central Bank with instructions and specific directions that the bills of lading were to be made and delivered to the Central Bank; and the cattle were so received and shipped, and the bills of lading made out and so delivered:"

"The Central Bank delivered to the company, through the Canadian Pacific Railway Company, 150 head of cattle at the Steamship 'Lake Ontario,' with directions that the bills of lading were to be drawn to their order and sent to the bank at Toronto; these directions we carried out."

It is to be observed, it is not required that the bank shall *hold* the bill of lading before the right and title passes to it; but the bank may *acquire and hold* the bill of lading, and the right and title is vested from the *acquisition*; and by implication the bank may *receive* the goods,

\* See *Andrew v. Crossley*, W. N., January 16, 1892, p. 1--and February 20, 1892, p. 27.

Judgment. etc., before the bill of lading is given, whenever the bill is made directly in favour of the bank instead of to the previous holder or owner.

Then as soon as the cattle came into the claimants' possession; as soon as they were delivered to them; the bank became entitled to the bill of lading: See *The British Columbia, etc. Co. v. Nettleship*, L. R. 3 C. P. 499; *Jones v. Hough*, 5 Ex. 115; *Stumore Weston & Co. v. Michael Breen*, 12 App. Cas. 698; and the bill of lading ought to take effect from that time, although the actual filling up of the form and the manual delivery of it did not take place until some little time afterwards: see *The Duero* L. R. 2 Adm. 393. Surely the endorsee of a bill of lading would have an action against the carrier for any cause arising between the time of the delivery of the goods and the delivery of the bill of lading.

I cannot think that the word "transferred" used in subsec. 4, of sec. 53, limits the bank's right to acquire bills and receipts upon a prior promise, to cases in which they are taken indirectly; but that, as before stated, the prior promise was with the pre-existing debt to have the same effect as a present consideration.

I refer also to *Bryans v. Nix* 4 M. & W. 775; *Anderson, v. Clark*, 2 Bing. 20; *Evans v. Nichol & Ludlow*, 11 L. J. N. S. C. P. 6; *Hoare v. Dresser*, 28 L. J. N. S., Chy. 611; *Ogle v. Atkinson*, 5 Taunt. 759; *Crooks v. Allan*, 5 Q. B. D. at p. 40; *Wagstaff v. Anderson*, 5 C. P. D. at p. 177; *Leduc & Co. v. Ward*, 20 Q. B. D. 475; *Adone & Tobit v. Seeligson & Co.*, 54 Tex. 593; *Pettit & Co. v. First National Bank of Memphis*, 4 Bush. (Ky.) 334; *David Skilling v. F. W. Bollman*, 6 Mo. App. 76.

The seeming hardship in the result of all the litigation over the goods in question—the leaving of the claimants to sustain the loss of the large amount in question although apparently mere carriers, having no real interest in the goods or the judgment under which they were attached,—vanishes when their conduct in the matter is looked at. It is difficult to understand why, in the face of the writ,

they should make out and deliver the bill of lading and send forward the cattle without as much as informing the bank of the facts. Had the information been given, a different course might have been pursued. And it is quite as hard to understand why the claimants should have undertaken the litigation in the Quebec Court, except at the request of and upon some understanding with the bank, instead of interpleading or in some other manner compelling it to fight its own battle. The result might possibly have been different if that had been done; but, however that might be, the claimants could have relieved themselves entirely and have saved much litigation and expense as well as any apparent clashing in the administration of the law in the two Provinces. Their course in the matter seems inexplicable. Certainly no attempt was made to justify or satisfactorily explain it. It may be no consolation to them, but one cannot help feeling that they have only themselves to blame for their loss.

It is unnecessary for me to consider the other objections, urged upon this appeal, against the claim.

For the reasons given I must sustain the result in the Master's office—the rejection of the claim—and dismiss this appeal.

*Appeal dismissed with costs.*

G. A. B.



## [CHANCERY DIVISION.]

## RE WATSON'S TRUSTS.

*Settled estates—Power to grant renewable building leases—English Settled Estates Act of 1856—19 & 20 Vict. c. 120—53 Vict. c. 14 (O.)—“Usual custom”—Meaning of in the Province.*

In applying the English Settled Estates Act of 1856, 19 & 20 Vict. c. 120, to this Province, the words “usual custom” in section 2 must be satisfied with something less than the immemorial custom of England. It is satisfied by proof of a well recognized method or usage of framing building leases in a given locality. Under that statute and 53 Vict. c. 14 (O.) the power to lease with extended right of renewal may be granted up to 999 years.

## Statement.

THIS was an application by an executor for leave to lease for building purposes certain lands devised by a will to be held for three generations before being sold, the rents being divided in the meantime between the devisees, their children and their descendants.

The petitioner relied upon affidavits shewing that the lands were, to a certain extent, unproductive because there was no money belonging to the estate on hand available for the purpose of improving the property by building, and that it was customary to lease lands in the city of Toronto for the desired term.

The application was made on petition to the Divisional Court on December 10th, 1891, before BOYD, C., and MEREDITH, J.

*D. E. Thomson*, Q. C., for the petitioner. The Court of Chancery in England has power under the Settled Estates Act of 1856, 19 & 20 Vict. ch. 120, sec. 2, and 21 & 22 Vict. ch. 77 (Imp.), to grant leases with power of renewal beyond ninety-nine years where it is the usual custom of the district where the lands are situate, and beneficial to the inheritance. We have shewn that on our evidence.

*J. Hoskin*, Q. C., for the infants and (by order) for the unborn issue. The affidavits filed cannot be contradicted,

even if it were advisable to do so. The case made for the **Argument.** petitioner really shews that the inheritance would be benefited, in which the infants would participate. A larger rent will be realized. I refer to *Duke of Bedford v. Marquess of Abercorn*, 1 M. & C. 312, and *In re Cross's Charity*, 27 Beav. 592; Morgan & Chute's Chancery Acts and Orders, 5th ed., p. 214, *et seq.*

Thomson, Q. C., in reply, cited *In re Carr's Settled Estates*, 9 W. R. 776, and S. C., 7 Jur. N. S. 1267.

January 22nd, 1892. BOYD, C. :—

A sufficient case is made on the facts for granting the lease with extended right of renewal beyond ninety-nine years. That is shewn to be a usual practice in the city of Toronto where the land is situate.

The English Settled Estates Act of 1856, sec. 2, provides for length of renewal beyond ninety-nine years where it is the usual custom of the district and beneficial to the inheritance. This statute is incorporated with our law, and in applying it to Canadian affairs the words "usual custom" must be satisfied with something less than the immemorial custom of England. In a new country it is satisfied if we find that there is an approved and well recognized method of framing building leases in a given locality which fixes the rule by long-continued usage. See per Bowen, L. J., in *Dashwood v. Magniac* [1891], 3 Ch. 367.

The Courts in England have granted periods of 600 and 999 years, but not in perpetuity. This last power to lease in perpetuity is given by the English Act of 1882, sec. 10 (not in force in Ontario).

The late Provincial Statute 53 Vict., ch. 14, gives general power to the Court to determine the length of time for which renewals may be made; but this, I think, contemplates some limitation and not the right of indeterminate renewal.

Judgment.

Boyd, C

I think the order may be in this case to renew for a term not exceeding 999 years, which sufficiently approximates to perpetuity to satisfy the requirements of the petition.

MEREDITH, J. :—

The words “the usual custom of the district,” can hardly have reference to a “custom” in its technical sense: a local common law. See *Grand Hotel Co. v. Cross*, 44 U. C. R. 153, the cases there referred to, and *Dashwood v. Magniac* [1891], 3 Ch. 306.

But rather a custom in the sense of, and perhaps better termed, a usage: a general well understood use of the extended renewal term, desired, in renewable building leases in the locality; an existing prevalent usage of the place. See *Juggomohun Ghose v. Manickchand and Kaisreechand*, 7 Moo. Ind. App. Cas. 263, at p. 282; *Legh v. Hewitt*, 4 East. 154, at p. 159; *Dalby v. Hirst*, 1 B. & B. 224; *Prestney v. Mayor and Corporation of Colchester*, 21 Ch. D. 111. See also *Burrowes v. Cairns*, 2 U. C. R. 288.

And the recent legislation upon the subject of the power of this court to grant leases of settled estates—53 Vict. ch. 14 (O.)—seems rather to extend than limit the right under the Imperial Acts.

I therefore agree that there is power to authorize and sanction a building lease as, and renewable for the term, proposed.

But I am of opinion that that power should be exercised only after the most careful scrutiny and consideration of the application, and where the case is plainly within the Acts, and the exercise of the power manifestly beneficial to the inheritance.

I was inclined to think that the evidence in this matter falls short of what should be required: that it is not sufficiently shown; that according to the custom in Toronto, by lease renewable for a term of 999 years is the mode of

disposing of property for building purposes, and that the Judgment. property in question could not be beneficially disposed of Meredith, J. for such purposes on any other terms. But I am not prepared to dissent on that ground, considering the view just expressed, as well as the views wishes and requests of all persons concerned who are *sui juris*, as well as of the Official Guardian acting for all other possible interests.

I refer to *In re Carr's Settled Estates*, 7 Jur. N. S. 1267; *In re Cross's Charity*, 27 Beav. 592; *In re Elliott's Settled Estates*, W. N. (1879), 135; *The Duke of Bedford v. The Marquess of Abercorn*, 1 M. & C. at p. 336; *Cecil v. Langdon*, 54 L. T. R., N. S. 418, and *Peers v. Sneyd*, 17 Beav. 151.

G. A. B.

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## [CHANCERY DIVISION.]

## WALLIS V. SKAIN ET AL.

*Lien—Mechanics' lien—Form of—Omission of name and residence of person on whose credit work done—Demurrer—Costs.*

The omission from the registered claim of lien of the name and residence of the person for whom or upon whose credit the work is done or materials furnished, provided for by sec. 16 of the Mechanics' Lien Act, R. S. O. ch. 126, is fatal to the lien.

The objection can be taken by a contractor as against a sub-contractor; and as in this action it might have been raised by a demurrer, the costs of defence were given as of a successful demurrer, to be set off against the costs of a judgment on the pleadings for an admitted debt.

**Statement.**

THIS was an action brought to enforce a lien by Frank Wallis, a sub-contractor, against John Skain and others, owners of the property in question, and John McNamara, the contractor.

The lien as filed was in the following form:—"Frank Wallis, of the city of Toronto, in the county of York, plumber, under the Mechanics' Lien Act, claims a lien upon the estate or interest of John Skain, Joseph Skain, James Skain, Bridget Skain, and John McNamara, all of the city of Toronto, in respect of the following, that is to say: For work done and materials furnished on a contract for the plumbing work in three houses on the property hereinafter described, which materials and work the said Frank Wallis furnished and did on or before the 17th day of December, 1890: the amount claimed to be due, or to become due, is the sum of \$270: the description of the land to be charged is the following:—Lots nine and ten in Block 'B,' on the east side of Walnut Avenue, in the city of Toronto, as shewn on registered Plan D 227.

Dated at Toronto this 15th day of January, A.D. 1891.

(Sgd.) FRANK WALLIS."

The action was tried on February 5th, 1892, without a jury, before BOYD, C.

It appeared at the trial that there was an action pending, <sup>Statement.</sup> brought by the defendant McNamara against the owners for the balance claimed to be due on the contract to build the houses, and that the owners were willing that a judgment should be granted in this action in favour of the plaintiff, the amount of which should be deducted from the contractor's claim.

The defendant McNamara, however, among other defences claimed that the lien registered was not sufficient in form under sec. 16 of R. S. O., ch. 126, in that the name and residence of the person for whom or upon whose credit the work was done and materials furnished had been omitted, and cited *McNamara v. Kirkland*, 18 A. R. 271, at p. 273,

The learned Chancellor reserved judgment.

*McMichael*, Q. C., and *J. A. Mills*, for plaintiff.

*G. G. Mills*, for defendant McNamara.

February 8th, 1892. BOYD, C.:—

Various questions were raised in evidence and argument which do not arise upon the record. The main dispute is whether there is a right of lien.

Upon the evidence the plaintiff would have difficulty in making this plain, but there is a fatal objection to his lien on account of the omission of one of the statements required by the statute. "The name and residence of the person for whom and upon whose credit the work is done," *shall* be stated as provided in section 16 of the Act, but upon this point the registered claim of lien is silent, as appears in the 6th section of the plaintiff's pleading where it is set out *in extenso*. The lien which arises upon the doing of the work may be continued by the registration of claim as directed by the Act.

Some sufficient observance of all the material statutory components of that claim must appear in the Registry Office before the benefit of *due* registration can be obtained under section 23. And the action as instituted is too late under section 22.

Judgment.

Boyd, C.

To affect the land a valid registration is required, and the provisions of the Act must govern as to what is needed to make a valid registration. This action by the subcontractor was one in which the contractor to whom credit was given was distinct from the owners of the land; but apart from this, where one statement which the statute prescribes is entirely omitted, it is not for the Court to discriminate as to its importance but simply to say "the Act has not been complied with."

Not inappropriate is the language of Lord Colonsay in *Thorp v. Brown*, L. R. 2 H. L. at p. 236: "I am very decidedly of opinion that where a statute requires a particular thing to be done, and especially where it requires something to be done in regard to a matter such as this, which has the operation of transferring rights in lands, it is necessary that the statute should be complied with in the way that is there pointed out, and that equivalents cannot be accepted. But there is a great difference between the entire omission of the statement and the question whether the statement is sufficient for the accomplishment of the purpose of the statute." He then goes on to point out that when vagueness of statement is pleaded, then it is important to consider what is the object for which the statement is required by the statute. But that is not the enquiry where we find a case of entire omission, such as the present.

This objection might have been raised by demurrer, and the costs of defence should be given as of a successful demurrer to be set off against the costs of judgment on the pleadings for the admitted debt of \$270, on the County Court scale.

There may be a valid charge upon the fund in the hands of the owner, under section 11 of the Act, but that question is not presented on this record, and it is one which may be raised before my brother ROSE upon the realization of the larger lien obtained by the contractor against the owner.

## [CHANCERY DIVISION.]

## ROBERTS V. DONOVAN ET AL.

*Contempt of Court—Nonperformance of an act necessitating the payment of money—Committal.*

On a motion to commit a party to an action for contempt of Court for noncompliance with a judgment directing a certain thing to be done, the Court will consider wherein the real disobedience consists, and if that in effect is the nonpayment of money will refuse the application as being in contravention of the statute R. S. O. ch. 67, sec. 6.

Such an application was refused where a defendant was ordered to procure a mortgage to be discharged by another person.

*Male v. Bouchier*, 1 Ch. Ch. 359; 2 Ch. Ch. 254, followed.

THIS was a motion to commit the defendants for con-Statement.  
tempt of Court, for noncompliance with the judgment in an action brought by Eliza Roberts against Joseph A. Donovan and others.

At the trial of the action after the evidence of the plaintiff was heard, the defendants agreed to a consent judgment, which contained the following clause. (3)  
“And this Court doth further order and adjudge that the defendants do, within three months from this date, cause the mortgage in the pleadings mentioned to one Robert Beaty, registered against the lands and premises in question, herein to be discharged, save and except as to the life estate, which the defendants acquired from the plaintiff as hereinbefore mentioned.”

This not having been complied with within the time limited, or for a long time thereafter, the plaintiffs moved to commit the defendants.

The motion was argued on February 17th, 1892, before BOYD, C.

*Hoyles*, Q. C., for the motion. The judgment was consented to by the defendants, and they are bound to discharge the mortgage. They have not only not discharged it, but they have dealt with the property since, showing a



**Argument.**

disregard of the order of the Court. They should regard the order of the Court. They should discharge the mortgage or be committed. An order in a similar case was made by Mr. Justice ROBERTSON in a case of *Currier v. White*, not reported.

*Donovan*, in person. The mortgage cannot be discharged without the payment of money. An order to commit under the circumstances would be a committal for the non-payment of money : R. S. O. ch. 67, sec. 6.

*Claude McDonell*, for defendant Hayes. The defendant Hayes was a mere trustee for the defendant Donovan, and had no beneficial interest even if an order for committal for the nonpayment of money could be made.

*Hoyles*, Q. C., in reply.

February, 17, 1892. BOYD, C. :—

The statute declares that process of contempt for non-payment of any sum of money payable by a judgment of the Court is abolished (R. S. O. ch. 67, sec. 6).

In *Male v. Bouchier*, 1 Ch. Ch. 359 ; *S. C.*, 2 Ch. Ch. 254, Spragge, V. C., laid it down that the Court will consider wherein consists the real disobedience ; and if in effect and substance the essential thing to be done is the payment of money, whether to a party or a stranger, then an order to commit would be a contravention of the statute.

The original of the statute cited above was in 1857, and this decision expounding the Act, in June, 1865, has never been questioned. It governs the present case.

I understand that the case cited by Mr. Hoyles of *Currier v. White*, was decided by my brother Robertson, on the ground of fraud, committed by the person who was ordered to discharge the mortgage. In that regard the present case is different, because the judgment is by consent, and the charges of fraud are expressly declared by its terms to be "not proved." But eliminating the element of fraud, I cannot doubt that the real thing to be done here, is to pay the mortgage held by Beaty.

The direction in the consent judgment is thus phrased : Judgment.  
“And this Court doth further order and adjudge that the Boyd, C.  
defendant do, within three months from this date, cause the mortgage in the pleadings mentioned to one Robert Beaty, registered against the lands and premises in question herein to be discharged, save and except as to the life estate which the defendant acquired from the plaintiff as hereinbefore mentioned.” Beaty is the person to execute the discharge ; the defendants are the persons to get him to do it, but this cannot be accomplished without the payment of the amount (some \$3,000) for which it is held as security.

Following *Male v. Bouchier*, I refuse the application, but without costs.

G. A. B.

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## [CHANCERY DIVISION.]

RE NORTH PERTH.

HESSIN V. LLOYD.

*Constitutional law—Prohibition—Revising officers—Electoral Franchise Act  
—Jurisdiction of the High Court of Justice.*

There is no jurisdiction in the High Court of Justice to issue a writ of prohibition to a revising officer to compel him to abstain from performing any duty under the Electoral Franchise Act. The legislation in regard to such matters does not trench upon nor is the question one of "property and civil rights in the Province." *Re Simmons and Dalton*, 12 O. R. 505, not followed.

## Statement.

THIS was an application for a prohibition to the revising officer for the North Riding of Perth, to prohibit him from removing certain names from the list of "Names to be removed," mentioned in section 4 of ch. 8 of 53 Vict. (D.), and from allowing them to remain on the original voters' lists, on the ground that no notice objecting to these names being on the list of "Names to be removed," had been given as provided by section 4, of 52 Vict. ch. 9 (D.).

It appeared that the revising officer had, on information he obtained himself, placed a number of names of voters on the list of "Names to be removed," and on information derived from certain declarations furnished to him, which had been made on information and belief, and which information he afterwards found to be inaccurate, had placed a further number of names on the said list of "Names to be removed," but had not actually removed them from the voters' lists. No notices of objection were given or received under 52 Vict. ch. 9, sec. 4; and the revising officer at the court, which he subsequently held, on ascertaining that the information in the declarations on which he had acted was unreliable, and that the persons were fully qualified to vote, allowed the names to remain on the original voters' list, and removed them from the list of names to be removed

From this decision, one Samuel Rollin Hessin, an elector, *Statement*. appealed to the County Judge, but his appeal was dismissed on the ground that he was not a person "who had made any objection," etc., or a person "with reference to whom an objection had been made," as defined in R. S. C. ch. 5, sec. 33.

This motion was then made to the Divisional Court, and was argued on December 10th, 1891, before BOYD, C., ROBERTSON and MEREDITH, JJ.

*Meredith*, Q. C., for the motion. The whole proceedings to be observed by the revising officer are plainly laid down in R. S. C. ch. 5, particularly in sections 15 to 21, and the amendments in 52 Vict. ch. 9 (D.), and 53 Vict. ch. 8 (D.). Those proceedings were correctly followed by the revising officer up to the putting the names in question on the list of "Names to be removed." There he must stop and those names must remain on the latter list, and should not appear on the original list; and the list of "Names to be removed," becomes final unless notices of objection are given under 52 Vict. ch. 9, sec. 4; which notices were never given. There is jurisdiction to grant the prohibition: *Re Simmons and Dalton*, 12 O. R. 505; and two late cases, one decided by the Queen's Bench Divisional Court: *Re Lilley and Allin*,<sup>1</sup> 21 O. R. 424; and the other by Meredith, J., sitting in Chambers in this Division: *Re Newton and Smith*.<sup>2</sup>

I also refer to *Re McCulloch and the Judge of Leeds and*

NOTE.—1. This case was carried to the Court of Appeal, and the appeal was dismissed without costs on the ground that the revising officer had obeyed the judgment of the Divisional Court and so the object of the appeal could not be attained, but no opinion was given on the question of jurisdiction.

2. In this case, while the application was granted in part, Meredith, J., doubted whether prohibition should go from this Court to a Court acting under the provisions of the Electoral Franchise Act, but considered he was bound to follow *Re Simmons and Dalton*, 12 O. R. 505.—REP.



**Argument.** *Grenville*, 35 U. C. R. 449 ; *Re Parsons and Toms*, 36 U. C. R. at p. 91 ; *Re Voters' lists of the Village of L'Original*, 9 P. R. 425, afterwards affirmed on appeal. See note, p. 430. Prohibition is the counterpart of mandamus ; High on Extraordinary Legal Remedies, 2nd ed., par. 763, at p. 605.

*Lash*, Q.C., contra. There really is no jurisdiction in this Court to interfere with a revising officer, although *Re Simmons and Dalton*, decides that there is. But if the Court is against me on other grounds I ask to have this question argued subsequently. This motion asks for prohibition, but really wants mandamus. The applicant is a stranger to the rights here, and is not interested except as one of the public, and so cannot come for prohibition : *The Mayor, etc., of London v. Cox*, L. R. 2 H. L. at p. 280.

Prohibition is granted *ex debito justitiæ*, when applied for by a party, but is altogether discretionary when applied for by a stranger : *Chambers v. Green*, L. R. 20 Eq. at p. 555 ; *Re Mayor's Court of London—Broad v. Perkins*, 21 Q. B. D. 533. There was really a fraud perpetrated on the revising officer by the declarations on which he at first relied, but afterwards found out were unreliable and misleading.

There was no excess of jurisdiction in the revising officer's conduct. He has a general jurisdiction over the voters' list, to put on those entitled to vote and take off those not entitled. It is a mere matter of procedure how he does it. He is to "revise and complete in the manner hereinafter provided the lists, etc.," R. S. C. c. 5, sec. 11. The object of the statute was fulfilled : *Re Revision of the Voters' Lists of Goderich*, 6 P. R. 213. He has all the powers of a Court of Record : section 24 ; he has power to amend and is not bound by rules of procedure, but is to do justice : sec. 26 ; he is to get any information he can : sec. 15 in sec. 4 of 53 Vict. c. 8 (D.) ; he might under 52 Vict. c. 9, sec. 6 (D.), have struck out of the original list the names contained in the supplemental list, but that is altered by 53 Vict. c. 8, sec. 7 (D.), under which he strikes

out those who have been declared to have ceased to be *Argument.*  
*qualified electors.* The names in question here have not  
 been so declared, in fact they are qualified electors. On  
 the question of notice, I refer to *Park Gate Iron Co. v.*  
*Coates*, L. R. 5 C. P. at p. 637.

*Meredith*, Q. C., in reply. The revising officers' powers  
 of amendment are circumscribed by the statute and not  
 unlimited. As to a stranger applying, see *Re Forster v.*  
*Forster*, 4 B. & S. at p. 203. I refer also to Shortt on  
 Prohibition and Information, 451 et seq.; *In re Denton*  
*and Marshall*, 1 H. & C. at p. 660.

December 23rd, 1891. BOYD, C.:—

The Chancery Division has in common with the other  
 divisions of the High Court of Justice plenary jurisdiction  
 to deal with matters of prohibition which concern the  
 administration of justice within Ontario, as a Provincial  
 unit. This (inherent) power is circumscribed by the re-  
 quirements of the Province and operates, I think, only as  
 to laws enacted by or in force in Ontario pertaining to  
 matters of Provincial cognizance under the B. N. A. Act.

Now the group of statutes relating to the election of  
 members to the House of Commons—embracing the Elec-  
 toral Franchise Act; the Representation Act, providing for  
 the division of Canada into electoral districts; the Elections'  
 Act, and the Controverted Elections' Act—are all of the  
 proper competence of the Dominion. In particular, Ontario  
 has no legislative power over the electoral franchise of  
 the Dominion. That subject has been regulated by the  
 Parliament of Canada and a new jurisdiction conferred for  
 the ascertainment of duly qualified voters in and for the  
 Dominion.

This legislation does not trench upon "property and  
 civil rights in the Province" as was intimated in *Re*  
*Simmons and Dalton*, 12 O. R. 505. On the contrary  
 this class of legislation is contemplated and sanctioned  
 by the 41st section of the Imperial Constitutional Act,  
 30 & 31 Vict. c. 3.

Judgment.

Boyd C.

Ontario has her own like sphere of the electoral legislation provided for in section 84 of the same Act. Neither interferes with the other, because they occupy different planes of political territory, but both are essential for the efficient working of the Canadian system of dual government.

The subjects of this class of legislation are of a *political* character, dealing with the citizen as related to the Commonwealth (whether province or dominion), and they are kept distinct in the Federal Constitutional Act from matters of *civil* rights in the Provinces which regard mainly the *meum* and *tuum* as between citizens. It is in my view rather confusing to speak of the right of voting as comprehended under the "civil rights" mentioned in sec. 92 sub-s. 13 of the B. N. A. Act. This franchise is not an ordinary civil right; it is historically and truly a statutory privilege of a political nature, being the chief means whereby the people, organized for political purposes, have their share in the functions of government. The question in hand, therefore, falls within the category not of "civil rights in the Province;" but of electoral rights in Canada.

The ascertainment of the right of voting has been entrusted by the Parliament of Canada to a new body of public functionaries called "Revising Officers" who are mainly a law unto themselves—the right of appeal being restricted to cases where the officer is not himself a Judge and then only (in Ontario and some other Provinces) to the County Judge. But there is no further bestowment of power upon the Provincial courts or judges in order to the due administration of the Electoral Franchise Act. And this abstinence is all the more noteworthy when compared with the ample jurisdiction conferred upon the Superior Courts of the Provinces by the statutes of Canada relating to elections. I read in this an unmistakable declaration of the mind of Parliament that there should be (beyond the limited right of appeal alluded to already) no interference with the revising officers by Provincial Courts.

To assert the jurisdiction now invoked, would savour to my mind of unwarrantable judicial usurpation both because the revising barristers' sittings are not subordinate judicial courts *quoad* the Province, and because these functionaries are officers of Canada engaged in the public work of the Dominion over whom the High Court of Justice for Ontario has not inherent or statutable jurisdiction.

Judgment.

Boyd, C.

I dissent entirely from the ground of decision in *Re Simmons and Dalton*, 12 O. R. 505, and there is no other reported case that warrants our issuing the writ asked for. Of suggestive decisions I note the following: *Re Allen*, 6 C. B. N. S. 334; *Re Local Government Board*, 16 L. R. Ir. 150; and 18 *ib.* 509; *In re Centre Wellington Election*, 44 U. C. R. 132; *The Queen v. Twiss*, L. R. 4 Q. B. 407.

I have considered the other aspects of the application, but do not deem it necessary to say more than this, that while no order is made at the instance of the applicant, the Court has jurisdiction to award costs against him. This should be done, and the application is dismissed with costs.

ROBERTSON, J. :—

Having considered this matter, carefully perused the material on which the motion is based, and having had the advantage of hearing read the exhaustive judgment of the Chancellor, I am of the opinion that this Court has not jurisdiction to prohibit the revising officer from doing what he proposes to do, in regard to the voters' lists. I fully concur in the judgment of the learned Chancellor, not only on this point, but on the question of costs; and I agree with him, and for the reasons assigned by him, that the motion should be refused with costs.

MEREDITH, J. :—

Though not urged upon this application there are two important questions which stand in the way of granting it,



Judgment.  
Meredith, J. namely: (1) Whether, as put by Cameron, C. J., in *Re Alexander Boyes*, 13 O. R., at p. 6, "the Court has any right at all to interfere with election officers, except where statutory power is given to it;" and

(2) Whether this Court, in any case, has jurisdiction, by way of mandamus or prohibition, over a revising officer exercising, or assuming to exercise, functions under the provisions of the Electoral Franchise Act?

In this case the alleged excess of jurisdiction was exercised while holding open Court under the provisions of the Act.

The first question does not seem to have ever come up for consideration; though the application for a mandamus has not been infrequent, and it has gone to an election officer acting under provincial statutes, of which *In re Miller Johnson*, 9 P. R. 425, is an instance. See also per Hagarty, C. J., in *Re Parsons and Toms*, 36 U. C. R., at p. 91.

The other question was fully argued, and determined in favour of the jurisdiction, in *Re Simmons and Dalton*, 12 O. R. 505, before the case of *Re Boyes*, but does not seem to have been there referred to; and the jurisdiction was exercised by the Divisional Court of the Queen's Bench Division very recently in *Re Lilley and Allin*, 21 O. R. 424, now in appeal.\* But there the question does not seem to have been considered, if raised.

I have always had very grave doubt of the right of this Court to interfere with such Federal courts; and in following *Re Simmons and Dalton*, in the cases recently before me in Chambers, did so because binding upon me sitting there, rather than because satisfied that it was rightly decided.

Parliament has committed the whole matter of the registration of parliamentary voters (which is one essentially within its exclusive power and control) to officers appointed by the Governor-in-Council, who hold office during good behaviour, but are removable on address by the House

\* See note ante p. 539.

of Commons alone; with an appeal from such officer—when Judgment. he is not also a judge of a Court, as in many instances Meredith, J. he is—in certain cases to the Judge of the County Court of the county in which the polling district in respect of which the appeal arises is situate.

It has seen fit to depart from the provisions of the Imperial Acts, providing for the stating of a case for the opinion of the High Court of Justice; and there is nothing in the Act to give any indication of an intention that Provincial Courts are to have any jurisdiction, power, or control over any of the proceedings under the Acts, or the revising officer or Judge in appeal.

The principle upon which the *In re Centre Wellington Election Case*, 44 U. C. R. 132, was determined against the jurisdiction of this Court, in a parliamentary election matter, seems quite applicable here: and not only has the judgment in that case stood unquestioned in this Province for many years; but it has been, by recent legislation—54 & 55 Vic. ch. 19, sec. 11 (D.)—evidently recognized as a true exposition of the law: legislation which seems, by expressly giving jurisdiction to this Court under the circumstances and for the purposes under consideration in that case, to more plainly indicate that, where jurisdiction is not expressly conferred, it was not intended that this Court should exercise any of the rights or powers of the high Court of Parliament in any proceedings under the Acts respecting the representation of the people in Parliament. See *Valin v. Langlois*, 3 S. C. R. 1 and 5 App. Cas. 115.

And it may well be thought that, if any supervisory powers over the officers in question were intended to be conferred upon, or permitted by, any other Court, such powers would have been given to one of the Federal Courts, so as to secure that uniformity in decisions under the Act, particularly desirable in such a matter, which might not be attainable if exercised by the Courts of the various Provinces.

The question is one in no way affecting “property and civil rights in the Province.”

Judgment.  
Meredith, J.

The provisions of section 41 of The British North America Act, 1867, have by reason of the Act in question, and other Acts, ceased to have effect. The unity in federal and provincial electoral matters has been completely severed.

So that this Provincial Court is asked to exercise a controlling jurisdiction over a purely Federal Court, established, under the authority of the British North America Act, 1867, for the better administration of the laws of Canada pertaining solely to the representation of the people in the House of Commons: a matter entirely beyond any Provincial right or control: a jurisdiction neither expressly nor impliedly conferred, but rather by implication excluded.

Before undertaking the prohibition of excess of jurisdiction in others this Court should be very careful not to exceed its own.

I therefore concur in refusing the application.

There should be no order as to costs. The case referred to, and which is now overruled, was a sufficient warrant for making the application.

G. A. B.

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## [CHANCERY DIVISION.]

## BURNS ET AL. V. DAVIDSON ET AL.

*Fraudulent conveyance—Land in foreign country—Absence of remedy there  
—Action to set aside here.*

An action will not lie in this Province by a judgment creditor to set aside, as fraudulent, a conveyance made by his debtor of lands situate in a foreign country, when the creditor has no remedy there, although all the parties reside in this Province.

Although the Court will interfere where the parties are within the jurisdiction in some cases where fraud exists in respect to specific property out of the jurisdiction, by ordering conveyances to be made to the person entitled, it will not do so when the relief sought is to subject the property to the exigencies of execution which it is powerless to enforce.

THIS was a demurrer to a statement of claim in an action **Statement.** brought by Messrs. Burns and Lewis, against Alexander Davidson and Alexander Purdom.

The statement of claim alleged that one Ebenezer L. Davidson had been in business, became insolvent and made an assignment for the benefit of his creditors, and that his estate only paid about forty cents on the dollar : that he subsequently became interested in certain lands in the State of Oregon, U. S., under the will of a brother : that he conveyed his interest therein to his father, the defendant Alexander Davidson, who mortgaged the lands to the defendant Purdom : that the conveyance and mortgage were made to defraud creditors : that the plaintiff was an execution creditor, and sued on behalf of himself and all other creditors : that the defendants resided within the jurisdiction of the Court : that by the law of Oregon no proceedings could be taken to set aside a fraudulent transfer of lands by a creditor until after judgment : that no judgment could be obtained in that State unless personal service could be effected on the debtor therein, or it was shown that he has property therein in his own name, and as he was not in the said State, and had no property there in his own name, the plaintiff was without remedy there, and asked that the said conveyance and mortgage might be declared



**Statement.** fraudulent and void, or that the defendants might be restrained from further dealing with said lands.

The defendants demurred on the grounds, among others, that as the lands were in the State of Oregon the Court had no jurisdiction, and that the cause of action, if any, was in the assignee and not in the plaintiffs.

The demurrer came on for argument before MEREDITH, J., and was by him referred to the Divisional Court, and was subsequently argued on December 11th, 1891, before BOYD, C., and FERGUSON, J.

*Purdom*, for the defendant, stated the case as above.

*Gibbons*, Q. C., for the plaintiff (with the consent of the Court before Mr. *Purdom*'s argument). The plaintiff has a right to set aside a fraudulent transaction perpetrated within the jurisdiction by parties within the jurisdiction, and the fact that the land is not exigible, makes no difference. If it was a mere matter of title depending on local laws, the Court might not interfere: *Massie v. Watts*, 6 Cranch, (U. S. S. C.) at p. 160; May on Fraudulent and Voluntary Dispositions of Property, 2nd ed., p. 3. The statute of Elizabeth was merely declaratory of the common law. The transaction sought to be impeached here, is a fraud in England, America and Canada, and admittedly so by people in the jurisdiction. I refer to *Arglasse v. Muschamp*, 1 Vern. 75; *Lord Cranstoun v. Johnston*, 3 Ves. 170; *Lord Portarlington v. Soulby*, 3 M. & K. 104; *Jackson v. Petrie*, 10 Ves. 163; *The Buenos Ayres, etc. R. W. Co. v. The Northern R. W. Co. of Buenos Ayres*, 2 Q. B. D. 210. [BOYD, C., can you find a case where the parties were restrained when the property was in a foreign country, not a British colony.] The principle is, that the parties are within the jurisdiction and so amenable in their persons: *Strange v. Radford*, 15 O. R. 145. The defendants may rely on *In re Hawthorne—Graham v. Massey*, 23 Ch. D. 743; but in that case there was no fiduciary relation and no suggestion of fraud.

Argument.

*Purdom*. The lands in question were not liable to be taken in execution and no conveyance of them could be a fraud: *May on Fraudulent and Voluntary Dispositions of Property*, 2nd ed., pp. 17-23; *Kensington v. Chantler*, 2 M. & S. 36; *Ex p. Shorland*, 7 Ves. 88; *Stokoe v. Cowan*, 29 Beav. 637. When execution does not attach, there is no relief: *Sims v. Strachan*, 12 A. & E. 536. The Court has no jurisdiction to set aside the conveyance and interference by injunction would be unjustifiable: *Kerr on Injunctions*, 3rd ed., 583, 584; *Story's Equity Jurisprudence*, secs. 366, 367; *Strange v. Radford*, 15 O. R. 145; *Norris v. Chambers*, 29 Beav. 246; *In re Hawthorne—Graham v. Massey*, 23 Ch. D. 743; *Dreyfus v. Peruvian Guano Co.*, 41 Ch. D. 151; *Bent v. Young*, 9 Sim. 180. A foreign judgment will not be recognized: *Piggott on Foreign Judgments*, 2nd ed., 139. The defendants can be sued in a foreign country: *Reiner v. Marquis of Salisbury*, 2 Ch. D. 378. The plaintiff could not commence his action in Oregon to set aside the conveyance until he had a judgment there, which he has not got. If there is any right here, Ebenezer Davidson's assignee has it: *The Bank of London v. Wallace*, 13 P. R. 176.

*Gibbons*, Q. C., in reply. The assignee has no right to or claim on any property acquired after the assignment.

January 27, 1892. BOYD, C. :—

*Penn v. Lord Baltimore*, 1 Ves. Sr. 444, leads a class of cases in which a plaintiff in England, having an equitable demand against a resident defendant, may enforce it not only personally, but if the circumstances of the contract or dealings between the parties justify it, may have a declaration of lien against the land of the defendant, though it be situate out of the jurisdiction of the Court.

All these cases depend on a privity existing between the parties arising from contract or from some personal obligation moving directly from the one to the other. They have gone to the very limit of the jurisdiction, and were

Judgment.

Boyd, C.

always encumbered with this difficulty; that the decree may be a mere *brutum fulmen*, incapable of being practically enforced against the defendant's property. I have summarized what is said upon this branch of law by Lord Romilly in *Norris v. Chambres*, 29 Beav. at p. 253.

On appeal, Lord Campbell, in 3 D. F. & J. at p. 584, spoke on the same point thus: "An English Court ought not to pronounce a decree, even *in personam*, which can have no specific operation without the intervention of a foreign Court, and which, in the country where the lands to be charged by it lie, would probably be treated as *brutum fulmen*. I do not think," he continues, "that the Court of Chancery would give effect to a charge on land in the county of Middlesex, so created by a Prussian Court sitting at Dusseldorf or Cologne." (This was decided in 1861.)

Many of the early cases to be found in the books, proceed as indicated in the judgment of Brougham, L. C., in *Lord Portarlington v. Soulby*, 3 M. & K. at p. 109, on the (supposed or assumed) superintendent power of the Courts in England over those in Ireland and the Colonies. But these cases if ever safe guides (which is much to be doubted) do not justify a Provincial Court intermeddling with territorial rights, acquired or subsisting in a foreign country. For that really is what must be ordered in this case, if anything of value is to come out of the litigation for the plaintiff, as he presents it on his record. He says in effect he is not able to get relief in the Oregon Courts, and therefore he asks that this Court declare fraudulent, null and void the conveyances impeached. In the alternative, it is sought to restrain the defendant from dealing with the land till the trial of the action; but that in the result comes to the same thing.

Now the relief given in these cases is well defined; nothing is set aside as between the defendants, but the conveyance found to be fraudulent is declared so to be as against the creditors; and to the extent of their claims they are allowed to have satisfaction out of the property.

In other words, the conveyance of the land out of the debtor to the third party is not allowed to interfere with the operation of the creditor's executions, and the Court of equity seized of the matter will itself proceed to sell by its own methods.

Judgment.

Boyd, C.

Authorities were cited to shew that in cases of fraud the Court would entertain jurisdiction even in cases of foreign lands. Reliance was placed on the language of Marshall, C. J., in *Massie v. Watts*, 6 Cranch, at p. 160, where it was broadly laid down "that in a case of fraud, of trust, or of contract, the jurisdiction of the Court of Chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that Court may be affected by the decree. But one has to look at a previous page to perceive the limitation of this passage; at page 158, the Chief Justice shews that he is speaking of a case of fraud, where one becomes the holder of a legal title acquired by any species of *mala fides* practised on the plaintiff. That is the proper limitation of the more general language used here; and also by Lord Hardwicke in a case, not cited, of *Angus v. Angus*—West's Cases, temp. Hardwicke, p. 23, where it is said, "this had been a good bill as to fraud and discovery if the lands had been in France, if the persons were resident here, for the jurisdiction of this Court as to frauds is upon the conscience of the party."—(1736.)

Where fraud exists in respect to specific property out of the jurisdiction, whereby in conscience it should be the property of the rightful claimant as against the fraudulent holder; these being within the jurisdiction, a Court of equity can decree according to the equities, and operate on the person of the defendant so that he shall convey the land to the one entitled. But where the manner of relief is, as here, not to order conveyances *inter partes*, but to subject land to the exigencies of execution, then no personal judgment can touch the real result to be accomplished.

The distinction which separates between cases of fraud



Judgment.

Boyd, C.

where the Court will act and will not act, is marked by Lord Nottingham in a case of *Carteret v. Petty*, 2 Swanst. 323, note ; he said this Court could proceed to a decree where the imprisonment of the person is the most proper means to effect that which is decreed to be done viz., the payment of money, making a conveyance, or the like. But where no obedience of the person imprisoned, or any act of his can sufficiently execute such a decree, then it is in vain to hold such a plea," p. 324.

Here is no case of contract or obligation *inter partes* ; no fraud of a personal character in regard to specific property claimed ; nothing in short by way of *personal equity* attaching to the defendants in respect of the land which this Court can lay hold of : but only a right sought, of having execution against alleged foreign assets of the debtor, held by another in fraud of creditors. This right *in rem* can only be effectually pursued in the *forum* of the site of the land ; no remedy there, simply means no remedy anywhere. The absence of redress in the State of Oregon as to land situate there confers no jurisdiction upon a Court in Ontario to make deliverance as to what should be done—that would be indeed a *brutum fulmen*.

As against the general expressions used in earlier cases, I prefer to follow the more guarded lines of jurisdiction, which obtain in recent decisions, of which one of the most important is *Harrison v. Harrison*, L. R. 8 Ch. 346. Lord Selborne, speaking with the concurrence of James and Mellish, L.JJ., said, " In our judgment all questions as to the burdens and liabilities of real estate situate in a foreign country, in the absence of any trust or personal contract (which might make a difference), depend simply upon the law of the country where the real estate exists."

I think the demurrer should be allowed with costs.

FERGUSON, J. :—

I have before decided almost the identical question in the same way on a motion for an injunction, and I now concur in the judgment just delivered.

G. A. B.

## [CHANCERY DIVISION.]

## HUMPHREY V. ARCHIBALD ET AL.

*Evidence—Malicious prosecution—Police officers' privilege—Disclosure of information—Discretion of Judge.*

In an action for malicious prosecution against two police officers, the defendants declined on examination for discovery, to give the name of the person from whom the information was received, on which the plaintiff was arrested and prosecuted, on the ground that it was contrary to public policy, and would obstruct the detection of crime if the name of the party informing was given :—

*Held*, that under the circumstances of this case, the defendants were bound to disclose the source of their information.

*Per* BOYD, C.—It is for the Court to decide whether the answering by subordinate officers of justice in ordinary prosecutions and causes arising thereout of any such question, would or would not in each case be injurious to the administration of justice.

*Per* MEREDITH, J.—The matter does not rest in the mere discretion of the magistrate, judge, or court. The disclosure should not be compelled, without the consent of the informer, except where material to the issue, necessary for its fair trial, and for the discovery of the truth of the controversy ; when higher public interest require it, and it then should be enforced.

Decision of FERGUSON, J., and the Master in Chambers, reversed.

THIS was an appeal from a judgment of FERGUSON, J., *Statement.* affirming a judgment of the Master-in-Chambers refusing to order police officers, the defendants in an action for malicious prosecution, to disclose the name of the person from whom the information was obtained on which the plaintiff was arrested.

It appeared that the defendant Slein, a police detective, had received certain information which he transmitted to his superior officer, the defendant Archibald, a staff inspector, who swore to the information on which a warrant was issued, and the plaintiff arrested and prosecuted. The plaintiff was tried before a police magistrate, who dismissed the charge.

The plaintiff then brought this action for malicious prosecution, and, on an examination of the defendants before the trial, sought to ascertain the name of the person from whom the information was obtained on which the warrant was issued and prosecution based. The police

Statement.

officers declined to answer on the ground of public policy, and that they had promised not to reveal the name, contending that it would obstruct the obtaining of information for the detection of crime if the names of the informers were given.

An application was made to the Master-in-Chambers to order the officers to disclose the name, and refused. That judgment was upheld on an appeal to Ferguson, J., in Chambers.

From this latter judgment the plaintiff appealed to the Divisional Court, and the appeal was argued on December 3rd, 1891, before BOYD, C., and MEREDITH, J.

*J. G. Holmes*, for the appeal. There was no sufficient information to justify the prosecution of the plaintiff. The defendants have pleaded reasonable and probable cause, and no malice, under R. S. O. ch. 73, sec. 1. The onus of proving absence of reasonable and probable cause is on the plaintiff, and he is entitled to know the source of the information so that he can judge whether there was reasonable cause. *Abrath v. The North Eastern R. W. Co.*, 11 App. Cas. 247, cited in *Stephen on Malicious Prosecution*, 104; as in 4 Q. B. D., but should be 11 Q. B. D. 440.

[MEREDITH, J.—Are you entitled to the names of an opponent's witnesses?] No, if the opponent will undertake that the parties are to be called as witnesses; but here the defendants not only refuse to give the names, but decline to undertake to call them as witnesses. It is not in the interest of public policy that any person can go to a police officer and by untruthful information have a party arrested on a criminal charge and be screened by his name being withheld. Nor that a policeman, in a careless manner, should take his information from an unreliable source and treat it as if it was entitled to full credence, and subject innocent parties to the disgrace of an arrest. It would be a direct premium on careless and reckless conduct of police officers where the liberty of the subject is concerned. There

is no authority for the proposition that a detective, under Argument. the circumstances disclosed here, is privileged. The cases of *Regina v. Hardy*, 24 Howell's St. Tr., 808, and *Webb v. Catchlove*, 82 L. T. R. 103, cited before Mr. Justice Ferguson, were criminal trials, but no such rule obtains in civil cases. Bray on Discovery, 547, sums up the law, and there is no privilege in civil cases mentioned there. The privilege between husband and wife is by statute: R. S. O. ch. 61, sec. 8.

So also a grand juror, though sworn not to tell what passes in the jury-room, has been compelled to tell it: *Freeman v. Arkell*, 1 C. & P. at p. 137; Taylor on Evidence, Bl. ed., 813. A clergyman pledged not to divulge the confessional has been held not privileged. Medical men's confidences are not privileged: Taylor on Evidence, Bl. ed., p. 787-789. See also *McFadzen v. The Mayor and Corporation of Liverpool*, L. R. 3 Ex. 279, and *Blake v. Pilfold*, 1 M. & Rob. 198.

*Herbert Mowat*, contra. Nearly all information given to the police is given under the pledge of secrecy. If the informer did not think he would be screened, he would not give the information. [BOYD, C.—But Cockburn, C. J., said in *Regina v. Richardson*, 3 F. & F. 693, that the instructions as to secrecy given to the police were for the purpose of repelling private inquiries, but not to prevent evidence in Courts.] Information given to public officials is protected: Taylor on Evidence, 8th ed., 810. A witness for the Crown cannot be asked if he gave the information: *Attorney-General v. Briant*, 15 M. & W. at p. 171. A party to an action is not entitled to the names of the witnesses for his opponent: *Attorney-General v. Gaskill*, 20 Ch. D. 519; *Eade v. Jacobs*, 3 Ex. D. 335. [MEREDITH, J.—That was all discussed in *Thornton v. Capstock*, 9 P. R. 535, by Cameron, C. J., but does not apply here, as what is sought is evidence upon the question of reasonable and probable cause.] The detection of crime would be materially obstructed. The defendants should not be obliged to undertake to call the informers as witnesses. They do not know



Argument.

what the effect of their evidence might be, or whether they could be procured as witnesses. In any event this is an interlocutory application, and the plaintiff has no right of appeal: Con. Rules 68 and 69; *Whiting v. Hovey*, 12 A. R. 119.

*Holmes*, in reply. An examination is not an interlocutory application under note to Con. Rule 68.

December 23rd, 1891. BOYD, C.:—

This is an action for malicious prosecution against two police officers (an inspector and a detective). The prosecution was begun upon information furnished to Archibald by the detective, Slemin, and the defendants being examined as to the source of the information, declined to give the name of the person through whom they were led to connect the plaintiff with the criminal charge.

They declined on the ground of privilege that it is against public policy to divulge the sources of information resorted to in the investigation of crime, and that it would destroy that protection to informers which encourages them to make disclosures to the police.

That such a privilege at all exists is denied in the editorial notes to the case of *Regina v. Richardson*, 3 F. & F. 693, in which case Cockburn, C. J., ordered a policeman to answer as to his informant. But that there is a rule of policy protecting these disclosures which obtains in the Courts, is manifest, from what is said in the late case of *Marks v. Beyfus*, 25 Q. B. D. 494.

One difficulty is just to determine the limits of the rule; its applicability to high officers of state and public functionaries, has been again and again recognized, but whether it protects the humble but necessary detective is not so manifest.

This, however, is well established that the application of the rule is discretionary with the Court having regard to all the circumstances of the case. There may be interfering cross-lines of policy so as to cast upon the Court

the responsibility of determining which is to govern. Thus as put by Lord Esher in 25 Q. B. D. at p. 498: "If upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved, is the policy that must prevail."

Judgment.  
Boyd, C.

In this case it is vital to the plaintiff's success to show a want of reasonable cause for the prosecution by the defendants; one main element upon which this depends, is the information upon which the defendant acts, and his belief based upon that in reference to the guilt of the party charged. If his information came from a credible source so much the better for the defendant; if from a person, notoriously unworthy of trust, or from an imaginary person (which is suggested here), so much the better for the plaintiff's success. But if at the trial, and by consequence before the trial, the defendant can wrap himself in privilege, and simply say that he acted on trustworthy information—giving no clue to test that by cross-examination or otherwise—the administration of the law will be crippled. The interests of the public are (in cases of malicious prosecution as in all other cases), that there should be a fair trial of civil rights, and that the inquiry as to malicious motives should not be frustrated by this barrier of privilege. The modern tendency is not to extend, but rather to limit instances of such privilege as is not obscurely hinted in *The Attorney-General v. Briant*, 15 M. & W. 169.

But speaking generally, and having in view the case of subordinate officers of justice in ordinary prosecutions and causes arising thereout, it may be said that it is for the Judge to decide whether the answering of any such question would, or would not, in each case, be injurious to the administration of justice: See Stephen's Digest of the law of Evidence, Article 113.

Judgment.

Boyd, C.

In the decision of *Lowe v. Goodman*, of the Exchequer Division, in 1878, on all fours with the present case, on a Chamber appeal, the Court held that the police officer was bound to answer upon interrogatories as to what information he had received, but left undecided as to his being obliged to give the name of the informer because the point had not been specially raised at Chambers. The case is reported in 42 J. P. 825 (not accessible to me), and is noted in the Digest of Justice of the Peace Cases 1862-1882, at p. 36; another recent decision not without pertinence is *Webb v. Catchlove*, 82 L. T. R. 103 (1886).

The reasons for requiring discovery of the name in this case are stronger than those urged in favour of secrecy.

The most efficient protection for the service of the detective, having regard to the well being of the commonwealth, is not to isolate him by some circle of privilege, but by holding him harmless when he acts without malice and upon grounds of reasonable suspicion. In other words, the same facility of redress should be given against these subordinate officers of the executive if they abuse their position as against the ordinary unofficial member of the community who engages in unscrupulous and unjustifiable prosecutions under the criminal law.

I favour allowing the appeal, with costs of all the prior proceedings for discovery to be costs in the cause to the successful party. The order will also direct the defendants to attend for further examination on this point at their own expense.

MEREDITH, J. :—

The question is one of very considerable importance, and by no means free from doubt and difficulty. That such a rule, as that which these police constables invoke, exists, there can be no doubt. It is one of frequent application in this province, especially in the administration of the criminal laws in the inferior courts.

And it is now firmly established in Great Britain and Ireland: and given effect to in the United States of America. The difficulty is rather to define its limits—as to its proper application. Judgment.  
Meredith, J.

It is clear that it rests upon public policy; that it exists in the public interests only; in aid of the detection and punishment of crime, and of the prevention of it.

It is in no sense a privilege of the police officer; nor enforced for his protection or benefit.

Public interests and public interests alone are sought to be furthered by it.

Whether they are or not; whether a sense of duty to society, and to the State, in those in whom such senses are not dead, and rewards to those in whom they are, without secrecy but with freedom from the injury that may be maliciously done and attempted under it, would, upon the whole, prove the better way, it is useless to discuss: the rule is too firmly established.

Carried to its logical conclusion, the rule must be absolute, neither requiring nor permitting the disclosure of the name of, or means of discovering, the informers.

I am unable to understand upon what principle it can be held that it should apply only in the case of high officers and not of subordinate ones, so long as the officer high or low has the right as such to receive the information; otherwise the public good in this respect would be much curtailed—if there be altogether enough for that—for informers come very much more in contact with the humbler grades of peace officers, such as these defendants, and they are much more likely than the others to receive such information.

Nor do I think that such a matter should or does rest in the mere discretion of the magistrate, judge or court.

After the best consideration I have been able to give the question, and all the cases, within my reach, bearing upon it; I am of the opinion that the disclosure of the source of such information given to any peace officer entitled as such to receive it, should not and cannot be—at



Judgment. least without the consent of the informer,—compelled or  
Meredith, J. admitted in the administration of justice, civil or criminal, in any action, matter, or proceeding, unless it be material to the issue, necessary for its fair trial and for the discovery of the truth of the matter in controversy; but that in all such cases higher public interests require it, and therefore it should be admitted and enforced.

Dealt with upon such a principle the information here sought ought to be given: it is material to the issue between the parties, and necessary, and perhaps essential, to a fair trial of that issue, as well as in seeking the truth upon the question of reasonable and probable cause, the want of which the plaintiff must establish or fail at the threshold of his case.

The privilege respecting State papers and State secrets, seems to me to stand upon a different footing; and it may well be that in guarding the State correspondence or information which “might be pregnant with a thousand facts of the utmost consequence respecting the state of the government, the connection of parties, the state of politics, and the suspicion of foreign powers with whom we may be in alliance”: Per Lord Ellenborough, C. J., in *Anderson v. Hamilton*, 2 B. & B. in note, at p. 157; or the disclosure of which might “put an end to all freedom of official communications, or involve the country in a war, at the instance of any suitor saying *fiat justitia ruat cælum*”: Per Field, J., in *Hennesy v. Wright*, 21 Q. B. D. at p. 512; or otherwise be injurious to the public service; the head of the department, or other high officer of State, may determine, and not the Court, the question, and hold them absolutely privileged: *Bradley v. McIntosh*, 5 O. R. 227.

I may add that I have found nothing in the material before us shewing that it was any part of the duty of any of these defendants to lay any information: their duty as to making arrests without a warrant is now reasonably plain; so that it may be that in laying the information in question they stand on no more privileged ground than a private prosecutor: though that would not in the view I

have taken of it directly affect the question to be now Judgment. determined; the rule being in no sense for their protection Meredith, J. but rather of that of the informer, in the interests of public morality, for the public good.

I refer to *Regina v. Hardy*, 24 Howell's St. Tr. 811; *Regina v. Watson*, 32 Howell's St. Tr. at p. 100; *Home v. Bentinck*, 2 B. & B. 130; *The Attorney-General v. Briant*, 15 M. & W. 169; *Beatson v. Skene*, 5 H. & N. 838; *Regina v. Richardson*, 3 F. & F. 693; *Lowe v. Goodman*, 42 J. P. 825; *Hennesy v. Wright*, 21 Q. B. D. 509; *Marks v. Beyfus*, 25 Q. B. D. 494; *Rogers v. VanValkenburg*, 20 U. C. R. 218; R. S. O. ch. 194, sec. 129; *The United States v. Moses*, 4 Washington C. C. 726; *Worthington v. Scribner*, 109 Mass. 487; *Commonwealth v. Pomeroy*, 117 Mass. 143; *O'Connell's Case*, Arm. & P. 178.

G. A. B.

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## [CHANCERY DIVISION.]

## HAYES v. ELMSLEY.

*Vendor and purchaser—Specific performance—Interest on purchase money—Prior action to rescind contract—Suspension of payment of interest.*

An agreement for the sale of land provided that the purchaser was to go into possession and into the receipt of the rents on payment of the purchase money, which was to be paid in twenty-one days from the date of the contract, and upon delivery of the conveyance, up to which events the vendor was to receive the rents, and if *from any cause* whatever the price was not paid within thirty days from the contract, interest was to be paid by the purchaser. The purchase money was not paid or appropriated, and after a disagreement as to the form of the conveyance, the vendor brought an action and obtained a judgment at the trial rescinding the agreement, which judgment was afterwards reversed and the agreement restored by the Court of Appeal. In the present action which was by the purchaser claiming specific performance and damages, the vendor was deprived of interest from the trial of his action for the rescission of the agreement until its restoration by the Court of Appeal.

Decision of ROSE, J., at the trial, varied.

The action to rescind might be enough to disentitle the vendor to claim interest pending the action, but the purchaser claimed cross-relief in that action, which would have kept him from paying the price till it was settled: this cross-claim not being abandoned till the trial, when judgment of rescission was pronounced, the payment of interest was not suspended till the abandonment of the cross-claim.

Damages refused in addition to specific performance, they being of a speculative nature.

**Statement.**

THIS was an appeal from a judgment of ROSE, J., in an action brought by Frederick B. Hayes, as purchaser, against Remigius Elmsley, as vendor, for the specific performance of an agreement for the sale of lands, claiming damages for delay.

The agreement provided that the purchaser should go into possession and receipt of the rents and profits on payment of the purchase money, which was to be paid within twenty-one days from the date of the agreement, and on delivery of the conveyance, and if from any cause whatever the price was not paid within thirty days interest was to be paid.

The action was tried at the Toronto Assizes on November 3rd, 1891, before ROSE, J., without a jury.

*W. R. Meredith*, Q. C., for the plaintiff.

Argument.

*Cassels*, Q. C., and *D. T. Symons*, for the defendant.

It appeared that the vendor had brought an action for the rescission of the agreement and had obtained a judgment rescinding it, at the trial, on February 19th, 1890, which judgment was affirmed by the Queen's Bench Divisional Court, but afterwards on March 10th, 1891, was reversed by the Court of Appeal and the agreement restored.

The principal questions in dispute in this action were whether the plaintiff was entitled to damages as well as specific performance, and whether the defendant was entitled to interest on the purchase money for all the time of the delay. The purchaser had contended at first that he had purchased the buildings as well as the land, but had abandoned that contention on the trial of the first action.

The learned trial Judge found that up to the time of the bringing of the action to rescind, in July, 1888, the delay was the purchaser's, in insisting on conditions he was not entitled to, and that he should pay interest to that time; that there was no appropriation at any time of the purchase money and that there was no wilful default on the part of the vendor at any time during the proceedings which entitled the purchaser to be relieved from the terms of his contract, nor any verbal agreement—as the plaintiff contended—to suspend the running of interest for a certain time; that the evidence did not show that the property had depreciated in value, and that the purchaser was not entitled to any damages, but was entitled to specific performance within a limited time, otherwise the defendant was entitled to a rescission of the contract.

From this judgment the plaintiff appealed to the Divisional Court, and the appeal was argued on December 7th, 1891, before BOYD, C., and MEREDITH, J.

*Meredith*, Q. C., and *Donovan*, for the plaintiff. The evidence shews the first delay was caused by waiting for



**Argument.** the return from England of the vendor, and the purchaser should not be charged interest for that time, really as much for the benefit of the vendor as of the purchaser, and at the suggestion of the vendor's solicitor who did not wish to act in his absence. It may be true that the purchaser did raise the question as to his right to the buildings, but he did not press it; and he afterwards at the first trial specifically abandoned it. The delay caused by the unsuccessful litigation to rescind the contract, was caused by the vendor, and if he was entitled to interest for all that time, he would be taking advantage of his own wrong. There was wilful default on the part of the vendor: *In re Starr-Bowkett Building Society and Sibuns Contract*, 42 Ch. D. 375; *Elliott v. Turner*, 13 Sim. 477, at p. 485; *Caffarini v. Walker*, Ir. Rep. 9 C. L. at p. 437; *Taylor v. Vergette*, 7 H. & N. 143; *In re Young v. Harston's Contract*, 31 Ch. D. 168; Dart's Law of Vendors and Purchasers, 6th ed., 723.

The plaintiff has been held entitled to specific performance, and he should get damages, to ascertain which there should be a reference. The evidence shows that but for the vendor's default, the property could have been sold at a larger profit to another purchaser; *Engell v. Fitch*, L. R. 4 Q. B. 659; *Vallin v. Walsh*, 6 C. P. 459. As the default was the wilful act of the vendor, the rule laid down in *Bain v. Fothergill*, L. R. 7 H. L. 158, and Dart's Law of Vendors and Purchasers, 6th ed., 1076, do not apply. *Rowe v. School Board for London*, 36 Ch. D. 619, may be cited; but in that case there was a right of way in question, which was held to be real estate; *Jacques v. Millar*, 6 Ch. D. 153; *Royal Bristol Permanent Building Society v. Bomash*, 35 Ch. D. 390; *In re Chifferiel—Chifferiel v. Watson*, 40 Ch. D. 45; *Larios v. Gurety*, L. R. 5 P. C. 346.

*Cassels*, Q. C., and *D. T. Symons*, for the defendant. The evidence shows that the purchaser never intended to purchase the property, as he had not the means. He only wished to tie it up under an agreement, and so take the chance of a sudden rise to sell at a profit. The Court of

Appeal, in the other action, found that the conduct of the vendor was *bonâ fide* throughout, and that the delay was the purchaser's. The purchaser should pay interest, as he had the use of the money and so received interest on it. His own letter in July, 1888, offers to pay interest, so that up to that time he must pay at all events. The terms of the agreement are explicit. The refusal to carry out must be almost fraudulent to be "wilful": *In re Dingman and Hall's Contract*, 17 A. R. 398. Wilful misconduct means wrong and *wilful* wrong far beyond any negligence; *Young v. Smith*, 4 S. C. R. at p. 510. In *Rowe v. The School Board for London*, 36 Ch. D. 619, it was contended that the plaintiff was entitled to both specific performance and damages; but it was decided that damages would not be given for the loss of expected profit. That is what is asked here, although the evidence does not even show that the property has depreciated in value.

*Meredith*, Q. C., in reply, referred to Dart's Law of Vendors and Purchasers, 6th ed., pp. 719, 725, and *Thompson v. Brunskill*, 7 Gr. 542.

January 22, 1892. BOYD, C.:—

*Jacques v. Millar*, 6 Ch. D. 153 is peculiar in this that while specific performance was awarded, damages were also given for the period during which the purchaser was kept out of possession by the wilful refusal of the vendor to complete. But in that case the proof was that the property was bought in order to carry on business, and the purchaser's business had been kept at a standstill and loss by the delay, for which compensation was made on the footing of estimated loss of profits in the business.

On a similar footing damages in the nature of compensation for loss of rent were awarded in *Royal British Permanent Building Society v. Bomash*, 35 Ch. D. 390, though the delay arose from causes other than wilful default by the vendor. But the same judge, Kekewich,

Judgment.

Boyd, C.

J., in *Rowe v. School Board for London*, 36 Ch. D. 619, refused damages where there was inability to complete for a time but without any bad faith on the vendor's part.

The general rule is laid down in *Chinnock v. The Marchioness of Ely*, 2 H. & M. 220, that damages will not be given *in addition* to specific performance, when the vendor does not appear to have suffered any special injury from the delay in completing the contract. This case was reversed in appeal 4 D. J. & S. 638, but this ruling is undisturbed.

This case falls rather under *Rowe v. London*, than the others cited. The damage claimed is from loss of profits on resale which might have been made. But this is a speculative matter, and as far as we can see from the evidence, the property gains value by the delay. There is no reason for coming to a different conclusion on this head from that of the trial Judge.

As to the payment of interest the purchaser's letter of 4th July, 1888, shews that there is no reason for relieving him therefrom down to that date. Thereafter notice to rescind was given, upon which litigation arose on 20th July, 1888.

Among other matters of objection set up by the purchaser to closing the transaction was the claim that he had bought the buildings on the land, which was a material matter of fact and law in issue. This claim, however, was abandoned during the examination of the purchaser's solicitor in open court on the 19th February, 1890. That was also the day of the trial, upon which Mr. Justice Street pronounced judgment declaring the contract to be rescinded. The judgment was affirmed by the Divisional Court in May, 1890, but was ultimately reversed by the Court of Appeal on 10th of March, 1891, and the contract restored.

The vendor while claiming interest for the whole period is willing to account for the rents and profits received by him, whereas the purchaser objects to pay interest because of the alleged wilful default by the

vendor in completing. Apart from the question of compensation and the claim for the buildings raised by the purchaser, in which he failed, there was no question of title, and the only point of difficulty in the former litigation was as to the form of the conveyance. It appears that the purchase money was (if ever in the hands of the purchaser) certainly never appropriated by him to this purchase.

Judgment.  
Boyd, C.

As to the form of the contract, it was that the purchaser was to go into possession and into receipt of the rents, on payment of the purchase money, and this purchase money was to be paid twenty-one days from the date of the contract and upon delivery of conveyance. Up to the payment of the price the vendor was to receive the rents. If *from any cause whatever* the price was not paid within thirty days from the contract, interest was to be paid by the purchaser.

The contract being to pay interest, the question is whether any cause has arisen to deprive the vendor of the benefit of that contract. The right to rents and profits is deemed the correlative of the liability to pay interest. If the purchase money is paid with interest that is equivalent to payment at the day for completion, and thereupon the accrued rents received by the vendor would be applied in reduction of the interest, the latter being, as is usually the case, the larger sum. See *Lord Palmerston v. Turner*, 33 Beav. 524.

If there is no fraud or wilful delay on the vendor's part, interest will have to be paid upon such a contract as this if a great space of time elapses before completion, and this cannot be avoided by any act of appropriating the money on the purchaser's part.

Upon that proceeds the late case of *In re Riley to Streetfield*, 34 Ch. D. 386, where there was appropriation by the purchaser but no wilful default by the vendor. But assuming wilful default on the vendor's part the cases do not make plain whether exemption from the payment of interest follows absolutely or



Judgment. only upon and after appropriation of the purchase money  
Boyd, C. by the buyer.

*In re Young and Harston's Contract*, 31 Ch. D. at p. 174, wilful default was held to disentitle the vendor to interest, though there had been no appropriation by the purchaser.

However, in *Re Monckton and Gilzean*, 27 Ch. D. 556, the wilful conduct of the vendor did not prevent him from recovering interest, but he only obtained such interest as accrued upon the sum appropriated to answer the contract. North, J., in *Re Riley to Streetfield*, 34 Ch. D. at p. 390, no doubt correctly says that in *Re Monckton* the question was not as to interest during delay in completion but during the time when there was a repudiation of the contract by the vendor. But it is difficult to understand why this is to work a different result from mere delay pending the contract. Rather should such an act of repudiation or cancellation on the part of the vendor by which the completion of the contract is effectually delayed till it is disposed of by the court, work more stringently against his recovery of any interest during the delay.

The conduct of the vendor in *Re Monckton* is so characterized by the Judge as to come within the meaning of "wilful default" as expounded in the later case before the Court of Appeal of *In re Young and Harston's Contract*, 51 Ch. D. at p. 175. He is spoken of as using a wholly "unreasonable objection" in order to end the contract.

*Re Monckton*, may be explained not as a decision about interest in such a case but as a concession made by the purchaser to pay the money appropriated and the bank rate of interest accrued thereon, but if it is used for more than this I think it conflicts with the principle of decision by the higher court in *Re Young*.

Now in the present case the vendors acted with the intention to rescind the contract and it was at their instance declared rescinded by the Court for a period of time during which it cannot be said that the purchaser was in default.

for not paying his money. It must be taken that during this time the vendor would not have received the price if it had been tendered. During this interval it seems to me that the weight of authority and also of reason is in favour of a suspension of interest. But in fixing this period it is to be observed that the purchaser made a contention as to the scope of the contract which it must be taken (on the other hand) would have prevented him from paying till that was settled. This contention, he renounces for the first time on the day of the trial, as I have noted.

Judgment.  
Boyd, C.

On that day then, 19th February, 1890, the two things appear: the purchaser abandons his objection and is willing to take the land without the buildings, and the Court declares the contract at an end. This state of things continues till the contract is reinstated by the Court of Appeal on 10th March, 1891. Between these dates the interest should be suspended, the vendor keeping the rents. But before and after this interval the interest should run at six per cent. the rents for the like time being deducted.

With this variation and with direction that no costs to either party on the issue as to interest the judgment should be affirmed without costs.

MEREDITH, J. :—

The findings of fact, upon the questions of damages and suspension of interest by agreement between the parties, cannot be disturbed.

They are well supported by the evidence. It is out of the question to now direct an inquiry upon the former, the plaintiff having fought it out at the trial.

The delay down to the day of the first trial is not attributable altogether to the defendant's wrong; it was not until then that the plaintiff's erroneous contention was first abandoned.

It cannot be that, because that contention was not so insisted upon as to entitle the plaintiff to rescind the contract, it is to have no effect upon the question of fact

Judgment. whether the delay was really caused by the plaintiff's wilful default.  
Meredith, J.

But from that day until that action was finally determined the delay was caused by the deliberate wrong of the defendant, however sincere his contention may have been.

A wrong of which—being in possession and having the rents and profits of the property for his own use—he obviously ought not to, and I think as clearly cannot, take advantage.

Such an agreement cannot mean that “any delay whatever” shall cover a wrongful delay on the vendor's part, the result of which is—according to the literal reading of the agreement at all events—to give him the interest as well as possession, rents and profits. The parties could never have meant anything so absurd, so obviously wrong. The vendor could never have expected or meant the purchaser to agree to it; or must have known he could not have meant and did not mean it.

A tender of the purchase money during that time would have been futile; the contract was rescinded so far as the vendor, and, at his instance, the Court, could rescind it.

The interest therefore was suspended during that period.

But after the restoration of the contract by the Court of Appeal there is no good reason that I can perceive for exonerating the purchaser from his duty to tender the purchase money. A mere claim of more than was due did not excuse it. As has often been said, the sight or even the offer of the money might have removed the difficulty—caused an abandonment of the excessive claim.

So that from that time the wrong was not altogether with the vendor, and the interest cannot be said to have been suspended by reason of his wilful default; but rather it may be said it was one of the delays contemplated by the parties or covered by their agreement.

A tender of the proper sum, if rejected, would have shown the subsequent delay to have been the vendor's and not, as it may be said, occasioned by the claims, or some

of them, which have now been determined adversely to Judgment. the plaintiff, in this action ; or otherwise, as urged at the Meredith, J. trial and upon the argument before us, caused by him.

G. A. B.

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[CHANCERY DIVISION.]

THE TRUST AND LOAN COMPANY OF CANADA V.  
STEVENSON ET AL.

*Limitation of actions—Payment by party not interested to mortgagee—Real Property Limitation Act—R. S. O. ch. 111, sec. 23.*

A payment to a mortgagee under section 23 of the “ Real Property Limitations Act,” or an acknowledgment of the right thereto by a person who, at the time of such payment or acknowledgment, is not liable for the payment of the mortgage money, or interested in the mortgaged property, will not enure to the benefit of the mortgagee so as to prevent the running of the statute against him.

THIS was a special case stated for the opinion of the Statement, Divisional Court.

The case set out that the plaintiffs were in the year 1863 mortgagees of certain land by virtue of two mortgages made by one Philips Edgar, the then owner, for the sums of \$800 and \$1,200 respectively : that one John Stevenson, in the year 1867, became a subsequent mortgagee under a mortgage made by Edgar for the sum of \$5,000 : that Edgar afterwards became insolvent and made an assignment for the benefit of his creditors ; and that his assignee conveyed the said land to said Stevenson on the 11th May, 1869 : that Stevenson conveyed the lands to a purchaser for value, on 27th September, 1869, through whom the defendant Damon Perry, who was in possession, acquired title by various mesne conveyances : that neither Perry nor any of those through whom he claimed ever acknowledged the existence of the plaintiffs’ mortgages, or that the plaintiffs had any interest in the said land, otherwise than by the payments made by John Stevenson : that the said John



## Statement.

Stevenson regularly paid the interest on the plaintiffs' mortgages from the time of the conveyance to him until the time of his death in 1884: that in 1881 Stevenson entered into an agreement with the plaintiffs reciting (contrary to the fact) that he was owner of the equity of redemption, and in consideration of an extension of the time for payment of the mortgages for four years, agreed to pay the principal and interest: that his executors paid the interest from the time of his death up to the year 1890, when they ceased paying it.

The plaintiffs claimed the amount of their mortgages and interest out of the land, and the defendant Perry claimed that the mortgages were barred by the Statute of Limitations under R. S. O. c. 111, secs. 19, 20, 21, 22, and 23.

The case was agued before the Divisional Court, composed of BOYD,<sup>2</sup>C., and MEREDITH, J., on December 5th, 1891.

*Marsh, Q. C.*, for the plaintiffs. This case really turns on the point raised in *Lewin v. Wilson*, 11 App. Cas. 639, whether the Statute of Limitations runs in favour of the defendant Perry, so as to give him title by possession as against the plaintiff mortgagees. The question depends upon sec. 23 of R. S. O. ch. 111: "No action shall be brought \* \* unless some part of the principal money, or some interest thereon, has been paid, or some acknowledgment of the right thereto has been given in writing, signed by the person by whom the same is payable," etc. Here we have both alternatives, payment of interest by Stevenson and a writing signed by him. In any event a payment by "some person concerned to answer the debt" is sufficient to keep the right alive: *Lewin v. Wilson*, 11 App. Cas. at p. 644. Stevenson was a person concerned to answer the debt. [BOYD, C.—Your contention is that he was not a stranger or a volunteer thrusting himself in.] Yes; and besides, he had the right to make an acknowledgment when he was a subsequent mortgagee and owner of the equity of redemption. If he had the right at one

time he had it afterwards, even if he parted with the land: *Bolding v. Lane*, 1 D. J. & S. 122. He was also bound to indemnify the insolvent estate of Edgar: *Boyd v. Johnston*, 19 O. R. 598. His deed shews he sold free from incumbrances, and that would make him "a person who was concerned to pay."

*Delamere*, Q. C., for defendant Perry, contra. The question is, what is payment of interest? Payment by a stranger will not avail. Stevenson was a stranger as soon as he conveyed the land away. Entering into an agreement with the plaintiffs to pay after he had parted with the land would not make him any the less a stranger. Until he entered into the agreement he was not bound to pay the plaintiffs as between them and himself. The plaintiffs could have refused to receive payment from him. I refer to *In re Frisby*, *Allison v. Frisby*, 43 Ch. D. 106; and *Newbould v. Smith*, 29 Ch. D. 882, 33 Ch. D. 127, and 14 App. Cas. 423.

*G. F. Ruttan* for the executors of Stevenson.

January 22, 1892. BOYD, C. :—

*Lewin v. Wilson*, 11 App. Cas. 639, carries the law to this point, as carefully expressed in the head note: "The rule that the only person whose payment on account will prevent foreclosure from being barred is the mortgagor or his privy in estate, or the agent of either of them, must be qualified so as to include any person who, by the terms of the mortgage contract, is entitled to make payments." The expression used in the judgment of Lord Hobhouse as to payment made by a party "concerned to answer" the debt, must be read as merely synonymous with and not expansive of the term "entitled" to pay. In other words, it is not enough that payment be made by a stranger or by a person once interested, but who has ceased to be so in the estate or in the contract; the money must proceed from one who has a right to pay as privy in estate or bound by contract.

Judgment.

Boyd, C.

In *Re Frisby, Allison v. Frisby*, 43 Ch. D. at p. 17, Fry, L. J., said: "In my opinion a payment satisfying the words of the section is made whenever there is a render of money to a person entitled to receive it, by a person liable to pay it. I agree that payment by a stranger would not do, the money in that case not being paid in discharge of a liability of the person paying it." He refers to the word "payment," as used in the English statute, corresponding to our section 23 of the Limitation Act. (R. S. O. ch. 111.)

Payments made on the mortgage given by Edgar to the plaintiffs by the Hon. J. Stevenson up to September, 1869, were made by him as interested in the estate as third mortgagee, or as concerned to answer, (*i. e.*, indemnify against) the debt as purchaser of the equity of redemption from the assignee in insolvency of the Edgar estate. But when Stevenson conveyed all his estate in the mortgaged land to his son, he became a stranger to the property and the mortgage liability. Though he covenants that the land conveyed was free from incumbrances, and that he had done no act to incumber, the effect of this, by the statute as to Short Forms, is to limit liability to acts of his own, and he would not, under this covenant, be responsible to clear off the Edgar mortgage.

The payments made by Mr. Stevenson subsequent to his conveyance of 1869, were, in my opinion, of an entirely voluntary character, so far as the case shews the facts; and in the face of *Newbould v. Smith*, 29 Ch. D. 882, 33 *ib.*, 127, and 14 App. Cas. 423, where it was affirmed on the facts, (but not on the law) it is not for us to assume that the payments so made, were in pursuance of some obligation which will affect the title now vested in the defendant Perry by virtue of length of possession.

The mortgagee is placed no doubt in a somewhat difficult condition, as was pointed out in *Pearce v. Morris*, L. R. 8 Eq. at p. 218, and L. R. 5 Ch. at p. 228. He is not bound to accept payment from a stranger, but if he does accept, it may be that such a stranger would acquire rights

as against the mortgagee. But these relations would be *inter se*, and would not affect prejudicially the claim of a person in possession whose title was accruing by effluxion of time. Such is the position of the defendant Perry here, and the payments made by Stevenson do not enure to keep the mortgage alive as against him.

Judgment.  
Boyd, C.

Judgment should be for the defendant with costs, as mentioned by my brother Meredith.

MEREDITH, J.:—

At the most, the person by whom the payments and acknowledgment of title were made was, as the purchaser of an equity of redemption, bound only to *indemnify* the mortgagor, or his estate in insolvency, against the mortgagor's personal obligation to pay the mortgage moneys and interest: *Waring v. Ward*, 7 Ves. at p. 337; *Campbell v. Robinson*, 27 Gr. 634; *Boyd v. Johnston*, 19 O. R. 598; *McMichael v. Wilkie*, 18 A. R. 464.

But no obligation, no liability to the mortgagees was incurred; there was no privity of contract whatever between him and them, nor ever any right of action by them against him to recover the mortgage debt; nor, after the conveyance by him on the 27th of September, 1869, any right of action between them at all: *Aldous v. Hicks*, 21 O. R. 95; *Williams v. Balfour*, 18 S. C. R. 479. See also *White & Tudor's L. C.* 6th ed., vol. 1, p. 757; and *Pollock on Contracts*, 5th ed. pp. 202-4.

There never was any liability, upon the covenants contained in the mortgages, on his part to pay; nor, as in *Lewin v. Wilson*, 11 App. Cas. 639, any right reserved in it to him to redeem. Whilst owner of the equity of redemption, and as such entitled to redeem the lands, there was the right to pay; after parting with it, there was neither the liability nor the right to pay to the mortgagees.

If any liability yet existed, it would be to the mortgagor or his estate only.



Judgment.

Meredith, J. There is nothing to show, nor was it contended, that the payments were made as agent for the mortgagor. The agreement—the acknowledgment of title—dated 3rd of September, 1882, which incorrectly recites that “the party of the first part is now owner of the equity of redemption of the said lands,” and the payments made under it, go to show that they were not so made.

In these circumstances, neither the payments nor the acknowledgment of title could, in any of the conflicting views of the provisions of the Act in question, prevent the statute running in favour of the purchaser, and the subsequent purchasers; the defendant Perry has accordingly a good defence under it against the plaintiffs’ claim.

Our judgment should, therefore, dismiss the action, and according to the terms of the special case, with costs as against the defendant Perry, but without costs as against the other defendants.

G. A. B.

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## [CHANCERY DIVISION.]

THE FRONTENAC LOAN AND INVESTMENT SOCIETY  
V. HYSOP ET AL.

*Mortgage—Conveyance of equity of redemption—Consideration therefor—  
Covenant by purchaser to pay mortgage money—Want of privity.*

Although the purchaser of the equity of redemption in a mortgaged property covenants with the mortgagor to pay the mortgage money, as the expressed consideration for the conveyance, there is no privity of contract or any implied obligation created thereby, which will enable the mortgagee to sue the purchaser for the amount.

THIS was an action brought by The Frontenac Loan and Investment Society against Abraham Hysop to recover the sum of \$3,000 under the following circumstances: Statement.

It appeared that one Charles Hysop had mortgaged some of his lands to the plaintiffs for the sum of \$4,000 and that the interest on the mortgage was in arrear, when he arranged to sell part of his property to his son, the defendant, for \$3,000. They both went to the office of the solicitor for the plaintiffs, who was then pressing for payment of the interest and it was arranged that Charles Hysop should convey a certain part of the land to Abraham Hysop, who agreed to pay \$3,000 to the plaintiffs on account of their mortgage, and the solicitor on behalf of the company undertook to have the plaintiffs' mortgage discharged from the land conveyed, upon payment to the company of the \$3,000. A deed was drawn and executed from the father to the son, in which the son as party of the second part covenanted as follows: "And the said party of the second part covenants with the said party of the first part that he will pay the sum of \$3,000, a part of a certain mortgage held by the Frontenac Loan Society on said premises, with interest thereon, as reserved by said mortgage, and which is to be the consideration for this conveyance."

No money was paid and nothing further was done until this action was brought by the company against the son,

Statement. which was tried at the assizes held in Kingston on October 12th, 1891, before ARMOUR, C. J., Q. B.

*Walkem*, Q. C., appeared for the plaintiffs, and  
*H. V. Lyon* appeared for the defendant.

At the close of the trial the following judgment was given :

ARMOUR, C. J., —I think I am bound by the decision in *Henderson v. Killey*\* : I find in this case that the only contract made by the defendant Abraham Hysop is the contract in the deed of the 2nd of April, 1889, from Charles Hysop to Abraham Hysop in which there is the covenant referred to.

— I think that is a contract which can only be enforced by Charles Hysop. I do not think the company have the right to enforce that contract : they are not a party to the contract, and there is no privity of contract between them and the defendant. I think it would be impossible to get a personal order on a judgment for sale on this state of facts against the defendant Abraham Hysop.

It is very unfortunate that the law is in such a state that any party beneficially entitled should not have the right to enforce a contract because he is not a party to it, or because he is not specially named.

The action should be dismissed, and the Court may dispose of the costs as they think fit.

From this judgment the plaintiffs appealed to the Divisional Court, and the appeal was argued on December 4th and 5th, 1891, before BOYD C., and MEREDITH, J.

*Walkem*, Q. C., for the appeal. The plaintiffs, as mortgagees, have the right to bring this action as for money had and received for their use : *Re Cozier, Parker v.*

\* See 14 O. R. 137, 17 A. R. 456, and appendix to that volume. S. C. *sub nom. Osborne v. Henderson*, 18 S. C. R. 698.—REP.

*Glover*, 24 Gr. 537; Articles 2 C. L. T. 49, 109, 157. If Argument. the charge is part of the price, the plaintiffs are entitled to recover: *Duke of Ancaster v. Mayer*, 1 W. & T. L. C., 6th ed., at p. 757. Then there is a trust in favour of the mortgagees: *Mulholland v. Merriam*, 19 Gr. 288. There was a sale for a certain sum and a direction to apply the money in a certain way. The company is here a party to the arrangement, being present in the person of their solicitor, when the covenant was entered into; so that the objection as to want of privity does not apply. The company promoted the whole scheme with a view to create a fund to pay their claim against Charles Hysop on their mortgage. The transaction amounted to an equitable assignment of the debt due by the son to the father: *Ryall v. Rowles*, 2 W. & T. L. C. 6th ed. at p. 841. In any event the defendants should only get the costs as of a demurrer.

*H. V. Lyon*, contra. When Charles Hysop conveyed to Abraham Hysop, he covenanted to convey free from incumbrances, which he did not fulfil. That was a condition precedent. The evidence shews that the company knew nothing of the facts of the arrangement when it took place. There is no privity between the company and the defendant. No evidence should have been admitted to shew any agreement or understanding not shewn in the covenant in writing. I refer to *Clarkson v. Scott*, 25 Gr. 373; *Norris v. Meadows*, 28 Gr. 334, and 7 A. R. 237; *Nichols v. Watson*, 23 Gr. 606. As to costs, the defendant could not risk a demurrer, and so admit all the facts in the plaintiffs' statement of claim.

January 22nd, 1892. BOYD, C. :—

*Re Cozier, Parker v. Glover*, 24 Gr. 537, proceeds upon the dicta in some early English cases and chiefly in American law to this effect as summarized in White and Tudor. "The acceptance of a deed reciting that the property is conveyed, subject to a mortgage \* \* implies an agreement to indemnify the grantor, but does not enure as



Judgment. an undertaking to pay the debt, unless the amount is  
Boyd, C. included in the consideration, and retained by the vendee as so much money belonging to the incumbrancer" (4th Am. ed., vol. II., p. 344). In such latter circumstances a right of action was held to exist though there was no direct privity between the purchaser of the equity of redemption and the mortgagee.

That ground of decision was not accepted as law or to be followed in *Clarkson v. Scott*, 25 Gr. 373, in which Spragge, C., adhered to the principles of his own previous decision in *Nichols v. Watson*, 23 Gr. 606. The difference between the English and American authorities is pointed out by Strong, J., in *Williams v. Balfour*, 18 S. C. R. at p. 481. And the English law is clearly indicated in a decision of Sugden L. C. not cited in *Re Cozier*, in *Barry v. Harding*, 1 Jo. & Lat. at p. 485, where it was held that if one purchase an estate subject to a mortgage, and gets only a conveyance of the equity of redemption, his covenant to pay the mortgage money and indemnify the mortgagor against it does not constitute a debt as between him and the mortgagee.

In *Barham v. The Earl of Thanet*, 3 M. & K., the Master of the Rolls said: "I entirely concur with Lord Alvanley and Sir William Grant that the purchaser of an estate subject to a mortgage who has no contract or communication with the mortgagee, and who merely covenants with the vendor to pay the mortgage debt, does not thereby make the mortgage money his personal debt; and that his covenant is to be considered simply as an indemnity to the vendor, who has permitted the amount of the mortgage money to be deducted from the price," p. 624. If, however, there has been contract or communication with the mortgagee which has resulted as in *The Earl of Oxford v. Lady Rodney*, 14 Ves. 417, in stipulating for different times of payment and for the enjoyment of the place, then direct liability would of course arise.

But here the stipulation was merely for the equity of redemption and no parol evidence carries the matter beyond

what is shewn in the writings between father and son. The evidence falls short of shewing any agreement between the son and the company by which any change was made in the terms of payment of the mortgage of the plaintiffs, even if any parol contract would change the terms of the security and affect the land: *Aldous v. Hicks*, 21 O. R. 95.

Judgment.

Boyd, C.

None of the grounds urged as to trusteeship or otherwise appear to me to change the result derived from want of privity in this transaction. The judgment should be affirmed.

As to costs it was not safe for the defendant to demur in the face of the averment that the defendant had covenanted to pay to the plaintiffs, and that the defendant had asked for and obtained time for payment from the plaintiffs. Neither of these averments is substantiated and the usual judgment for costs should be given as on the dismissal of an action.

MEREDITH, J. :—

There was no privity of contract,—so far as the writings shew,—between the parties: and the mortgagor is not a party to the action; it therefore could not be maintained by reason of the covenant only: *Nichols v. Watson*, 23 Gr. 606; *Re Cozier*, *Parker v. Glover*, 24 Gr. 537; *Clarkson v. Scott*, 25 Gr. 373; *Campbell v. Robinson*, 27 Gr. 634; *Aldous v. Hicks*, 21 O. R. 95; *Williams v. Balfour*, 18 S. C. R. 472; and see Pollock on Contracts, 5th ed., pp. 202-4.

Nor was there any sufficient evidence of a novation, or equitable assignment, or of any trust, or of any agreement by the defendant with the plaintiffs to pay the sum in question.

There was evidently no intention to create a direct liability in any of these ways; and the Court should not be too ready to enforce any such obligation against, or without, an intention to create it: see *In re Breton's Estate*, 17 Ch. D., at p. 421.

According to the testimony of the plaintiffs' solicitor—

Judgment. the only witness examined at the trial—he was to do  
Meredith, J. “what was proper between the father and son, the plain-  
tiffs, himself, and the other persons interested.”

He prepared the deed from the father to the son containing the covenant in question, but no other writing.

One cannot doubt that if there were to have been a novation, an assignment, a trust, or an agreement to answer for part of the debt of another, it would have been proper to have put it in writing, and it would have been, at the least, so evidenced.

The statement of claim is so drawn that the defendant could not have safely demurred.

The action was therefore properly, and this motion should be, dismissed with costs.

G. A. B.

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## [CHANCERY DIVISION.]

## BURFOOT V. DUMOULIN.

*Evidence—Admission of new evidence on appeal—Divisional Court—Cons.  
R. 585.*

On the argument of an appeal to the Divisional Court from the trial Judge where a by-law of the city of Toronto had been proved at the trial, but evidence was not given of the registration of the same, evidence was tendered on the argument of the appeal shewing the fact and date of the registration of the by-law :—

*Held*, that the evidence should properly be admitted.

THIS was a motion by the defendants, the Rector and Statement. Churchwardens of St. James' Cathedral, Toronto, by way of appeal from the judgment of Street, J., on the trial of this action at the Spring Assizes of 1891, in the county of York.

The motion came on for argument on June 9th, 1891, before FERGUSON and ROBERTSON, JJ.

In the course of the argument, the appellants produced a certificate of the registrar of the east riding of the city of Toronto shewing that a certain by-law which had been proved at the trial was in fact registered in the registry office for the east riding of the city of Toronto, on the 28th day of November, 1888, producing also a certified copy of the by-law, and an affidavit of their solicitor shewing that the by-law was so registered, and that he had, on the morning of the argument, obtained that information, and asked to have the same admitted in evidence.

*Arnoldi*, Q. C., for the appellants. It was by inadvertence that when the by-law was proved at the trial the date of registration was not mentioned to the Court. The evidence is purely documentary, and should be admitted. There is no prejudice to the other party in admitting it. There can be no answer to it, nor is it capable of any explanation, nor does it call for any act on the part of the plaintiff, nor is the position of the plaintiff in respect of the trial changed in any manner by it in regard to the



Argument. evidence he has given: Consolidated Rules 585 and 676; *Bank of British North America v. Western Assurance Co.*, 11 P. R. 434. It is essential in order to bring the whole merits of this case before the Court that this evidence should be admitted. It is never too late, by amendment or otherwise, to inform the Court of all the facts: *Peterkin v. MacFarlane*, 9 A. R. at pp. 429, 438.

*Osler*, Q. C., and *Watson*, Q. C., for the plaintiff, did not oppose the motion, if the Court thought proper to grant it; merely pointing out that the evidence was intended as a makeweight for the appellants.

The motion was ordered to stand to be considered with the merits of the appeal.

On September 5th, 1891, the Court gave judgment, allowing the appeal of the defendants, the rector and churchwardens, and in doing so allowing the evidence tendered on the trial of the registration of the by-law to be admitted.

A. H. F. L.

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## [CHANCERY DIVISION.]

## TILLIE V. SPRINGER.

*Executors and administrators—Right of retainer—Devolution of Estates Act—Assignment for creditors—R. S. O. ch. 124—Sec. 19, sub-sec. 4, sec. 20, sub-sec. 4.*

Under their father's will, two of his sons were to receive a share of the proceeds of certain land to be sold on the death of his widow, who was still alive. They also owed the testator a certain debt, which by the will was to be payable in five yearly instalments, from the time of his death.

About two years subsequent thereto the sons made an assignment for the benefit of their creditors under R. S. O. ch. 124.

*Held*, (1) that the effect of the assignment was by virtue of sec. 20, sub-sec. 4, of that Act, to accelerate payment of the debt due to the estate.

(2) That the executors being also the trustees of the land of which the sons were to receive shares when sold under the will, held security for their claim within the meaning of that Act, having (because of the Devolution of Estates Act) the right to impound the sons' shares under the will as against their debt to the estate. This security the executors and trustees should value pursuant to R. S. O. ch. 124.

THIS was an action brought by Francis Tillie and John Meyer, as executors of Frederick Guggisberg, deceased, against Moses Springer, assignee for creditors of the joint and separate estates of Christian Guggisberg and Walter E. Guggisberg (sons of Frederick Guggisberg), as individuals and as members of the firm of Guggisberg Bros., under a deed of assignment pursuant to R. S. O., ch. 124, dated December 8th, 1890, claiming a right as such executors to rank as creditors on the estates in the hands of the assignee for an indebtedness of \$1,173.21, due from Christian Guggisberg and Walter E. Guggisberg to their testator's estate; and that as security for payment of such indebtedness they held and were entitled to a lien on the shares of the said Christian Guggisberg and Walter E. Guggisberg, on the proceeds to arise from the sale of the testator's lands under the will, and that they were entitled to set off the amounts of such shares when realized against the said indebtedness and interest.

As set out in the statement of claim, Frederick Guggisberg died on February 29th, 1888, and by his will appointed

**Statement.** the plaintiffs executors and trustees thereof, and after certain specific devises, he devised to his wife the residue of his real estate in the village of Preston, for her life, and afterwards to his executors upon trust to sell and divide the proceeds among his sons and daughters; and he declared that as to any indebtedness to him of any of his sons they should be entitled to take time for payment of the same by five equal annual instalments from the time of his decease.

The indebtedness of Christian Guggisberg and Walter E. Guggisberg to the testator's estate amounted at the time of action brought to the above mentioned sum.

In his statement of defence the defendant denied the lien claimed by the plaintiffs, or that the plaintiffs were entitled to set off or retain the amount due their testator's estate out of the shares in the proceeds of the lands in Preston coming to his assignors under the will.

The widow of the testator was still living at the time of action brought.

The action came on for trial at Toronto, before BOYD, C., on January 20th, 1892.

*Bain*, Q. C., for the plaintiffs. The failure of the defendants to pay their debt has made the estate short of assets. The question is not one of set-off or retainer, perhaps, but one of equity, where funds will be in hand to meet this claim if not earlier paid. There is no trust until the fund is set apart for the defendants' assignee. I refer to Williams on Executors, 8th ed., pp. 1310-15; *Re Hodgson*, 9 Ch. D. 673; *Jeffs v. Wood*, 2 P. Wms. 128; *Lee v. Egremont*, 5 DeG. & Sm. 348; *Bousfield v. Lawford*, 1 DeG. J. & Sm. 459; *Cherry v. Boulton*, 2 Keen 319.

*DuVernet*, for the defendant. The right of retainer or set-off is only a right to satisfy out of assets in the hands of the executors. The fund in question here would be held by them not as executors but as trustees. The Court should not assist the trustees to get priority over the other creditors. The trust fund is not a security. The

plaintiffs would have no right or power to assign it to the assignee for creditors. It would be a breach of trust: *Ballard v. Marsden*, 14 Ch. D. 374; *Bain v. Sadler*, L. R. 12 Eq. 570; *Walters v. Walters*, 18 Ch. D. 182. Argument.

January 25th, 1892. BOYD, C. :—

The testator's sons, Christian and Walter, owe their father's estate a certain debt which, by an extension given in the will is made payable by instalments during five years from the testator's death (in February, 1888), and by the terms of the will, they are also to receive a benefit from his estate, consisting of a share of money to be derived from the sale of land after the death of the testator's widow, who is still alive. Technically they owe this debt to the executors, and they are to derive this benefit from the trustees of their father's will. But the trustees and executors are the same persons, and since the Devolution of Estates Act (which applies to this will), the representatives of the estate for all purposes may be regarded as the executors. The distinctions once existing between the administration of real and personal estate, if not now annihilated, are so minimized as not to be of practical importance in the solution of such questions as arise in this action.

The sons became insolvent, and in December, 1890, assigned under the Ontario Act to the defendant for the benefit of creditors. The assignment under section 4 of R. S. O. ch. 124, would unquestionably pass the interest of the sons in the share of the proceeds of the land to be sold after their mother's death.

And on the other hand, the effect of the assignment would be to accelerate payment of the debt due by the sons to the estate, so as to enable the plaintiffs (the executors and trustees) to prove for the amount with proper rebate, as provided by section 20, sub-section 4 of the Act. Things are thus equalized by the Act so that the whole available assets can be realized for the benefit of creditors; and all creditors, present and prospective, can come in for



Judgment.  
Boyd, C.

their proper distributive share of these assets. The fact of this assignment therefore changes the situation of the representatives and beneficiaries of the estate, and reduces the matter to this point, whether if the debt was presently payable by the sons, and they were entitled presently to receive their shares of the land to be sold, the one claim could be set off against the other, so as to advantage the representatives of the estate by way of retainer as against other creditors.

The policy of the Act and of the law in other statutes, is in favour of equality and against preferential payments, but an exception exists by the terms of the Act where security is held by the creditor. Here the executors are the creditors, and the point is, can it be said that what is in their hands (as trustees of the land) is (as expressed in section 19, sub-section 4) "security for the claim," or "security on the estate of the debtor?"

In English law the general rule is, that a legatee who is also debtor to the testator's estate, cannot (unless an intention that he should do so is manifested by the will) claim payment of his legacy without paying the debt; and therefore that the executors may in such a case retain the debt out of the legacy when payable. This right is not one of retainer or "set-off," in the proper use of these terms; but it is, viewed from the side of the beneficiary, his right to receive payment of the legacy, having regard to the amount of debt due to the testator's estate; and viewed on the side of the executor, his right to be paid the debt out of the fund in hand: *Re Batchelor*, L. R. 16 Eq. at p. 483, and *Smith v. Smith*, 3 Giff. at p. 271. This kind of right was discussed and regarded as a *security* for the debt, by Malins, V. C., in *Stammers v. Elliott*, L. R. 4 Eq., at p. 680, though upon the law he was reversed in appeal, L. R. 3 Ch. 195.

This right is one which is inherent, so that it is not displaced by the assignment of the legacy, and therefore if it exists the assignment for the benefit of creditors will not affect it: *Re Knapman*, 18 Ch. D. at p. 304.

Now in the present case, the executors, the plaintiffs, under the Devolution of Estates' Act, are the representatives of the estate of the father, deceased, for all purposes. Three instalments of the debt owing by the insolvents, are overdue and unpaid, and these represent so much assets outstanding; other assets of the estate coming out of the land, will be payable in the future by the executors to the insolvents or their assignee. If the time had arrived for the payment of these future assets, and the person claiming them were to repudiate payment of the debt of the insolvent to the estate, the remonstrance put by the Vice-Chancellor (Wigram) into the mouth of the executor similarly circumstanced would be apt: "You ask for a portion of the assets of the testator, but you are yourself a debtor to the testator's estate, and his assets are diminished *pro tanto* by your default; it is against conscience that you should take anything out of the estate until you have made good what you owe to it:" *Courtney v. Williams*, 3 Ha. at p. 554. He also in effect regards this right as in the nature of a lien, and speaks of it (in the case of trust property) as the equity of the trustee to *impound* the interest of a *cestui que trust* in the trust fund. That case was affirmed by the Lord Chancellor on appeal, and it will be found in 2 Reports in Conveyancing, p. 17.

Judgment.  
Boyd, C.

Another line of inquiry and consideration in order to estimate the rights of the parties may be thus put: The testator mentions the debt of the sons in his will, and by giving time for the payment of it manifestly contemplated its due payment. That debt when paid would constitute assets which are by him distributed as part of the residue; and this debt due by these sons is thus dealt with as part of the estate. The sons should not be allowed to enforce another part of the will which benefits them and give the go-by to the directions for the payment of the debt due to the estate. The testator did not intend to give the share of the land sales to the sons, and also to exempt them from the payment of their debt to him. In other words,

Judgment. the sons should not draw from the estate this benefit without making good that which the testator in effect directs them to pay into the estate, and the assignee for creditors stands no higher. I do not therefore give effect to either contention made before me, but propose to direct a middle course to which I adverted upon the argument.

Boyd, C.

I regard this right to impound the proceeds of the sale of the land as such a security on the estate of the debtor as is within the spirit of the Act. Some one has suggested that statutes have no spirit, and though that may be so as to composition, yet I do not presume to contradict the Legislature and the Parliament who have said so: R. S. O., ch. 1, sec. 8, sub-sec. 39, and R. S. C., ch. 1, sec. 7, sub-sec. 56.

Their security should be valued by the plaintiffs pursuant to the Assignment Act. The plaintiffs' costs should be paid out of the testator's estate, and the defendant's out of the insolvent's estate: as the question is both novel and difficult, and no decisive victory is gained by either side.

A. H. F. L.

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## [QUEEN'S BENCH DIVISION.]

## REGINA V. COSBY.

*Survey—R. S. O. 1877 ch. 146, secs. 34, 35, 36, 37 (R. S. O. ch. 152, same sections)—Road allowance between counties—Survey not conclusive—Admissibility of evidence.*

Monuments placed in compliance with the provisions of sections 34, 35, 36, and 37 of R. S. O. 1877 ch. 146, must be placed at the true corners, governing points, or off-sets, or at the true ends of concession lines, and there is nothing in these sections making a survey thereunder or the placing of the monuments conclusive, whether right or wrong, and evidence may be received in contradiction. So held on a case reserved from General Sessions on an indictment for obstruction of a highway, being the town line between two counties.

*Tanner v. Bissell*, 21 U. C. R. 553; *Regina v. McGregor*, 19 C. P. 69; *Re Fairbairn and Sandwich East*, 32 U. C. R. 573; and *Boley v. McLean*, 41 U. C. R. 260, distinguished.

THIS was a Crown case reserved by the Chairman of the <sup>Statement.</sup> General Sessions of the Peace for the county of Lincoln. The defendant was indicted for a nuisance in obstructing a highway between the township of Pelham, in the county of Welland, and the township of Gainsborough, in the county of Lincoln, being the town line or allowance for road between the two counties, on that portion of the road allowance between the second and third concessions of the township of Pelham and lot number one in the sixth concession of the township of Gainsborough; and was tried at the General Sessions on the 9th June, 1891.

At the trial it was shewn that in the year 1883 application was made to the Lieutenant-Governor of Ontario by the municipal council of the county of Lincoln to have the road allowance between the townships of Pelham and Gainsborough surveyed and marked by permanent boundaries, and by the municipal council of the county of Welland to have the same run out and established by competent authority; that thereupon Edward Gardiner, P.L.S., was appointed surveyor by the Commissioner of Crown Lands, and instructions were given him on the 6th August, 1883, "to survey the town line between the townships of Pelham



## Statement.

and Gainsborough, and to plant stone or other durable monuments at the ends of each concession line in the said townships abutting upon said town line or boundary between said townships;" that Mr. Gardiner proceeded with the work and made his report to the Commissioner on the 10th December, 1884, and accompanied the report with a plan or map shewing the monuments placed by him in accordance with his instructions, and the road allowance laid out between the townships; that the report was duly confirmed, after some correspondence with the municipal councils of the counties, with the approval of both; that the defendant had obstructed the road so laid out by Mr. Gardiner, and had continued to do so since the confirmation of the report.

During the trial counsel for the defendant offered evidence to prove that the work done by Mr. Gardiner was erroneous and wrong, and that an allowance for road between the townships had been made and run out in the original survey of the townships, and that the marks of such original survey and road allowance were plain to be seen, and no case arose for interference under the R. S. O. 1877, ch. 146, sec. 38, and following sections, in pursuance of which the proceedings had been taken by the municipal councils, and the work done by Mr. Gardiner.

Counsel for the Crown objected to the reception of this evidence, contending that the survey made by Mr. Gardiner under the authority above shewn was final and conclusive.

The Chairman ruled that the evidence offered was not admissible and that Mr. Gardiner's survey was conclusive, and directed the jury to that effect, and they found the defendant guilty; but, at the request of the counsel for the defendant, the Chairman took the evidence offered with the view of enabling the defendant to raise his objections fully before any appellate or other Court, and postponed judgment and admitted the defendant to bail.

In view of the decisions in *Tanner v. Bissell*, 21 U. C. R. 553; *Boley v. McLean*, 41 U. C. R. 260; and *Re Fair-*

*bairn and Sandwich East*, 32 U. C. R. 573, the Chairman <sup>Statement.</sup> reserved for the consideration of the Justices of the Queen's Bench Division of the High Court of Justice for Ontario, the questions whether such evidence should have been admitted and whether the survey was conclusive on the defendant.

The case was argued before ARMOUR, C. J. and FALCONBRIDGE and STREET, JJ., on 27th November, 1891.

*E. D. Armour*, Q.C., and *Aylesworth*, Q.C., for the Crown.

*W. M. German*, for the defendant.

February 1, 1892. The judgment of the Court was delivered by

ARMOUR, C. J.:—

We are of opinion that the evidence offered was admissible, and that Mr. Gardiner's survey was not conclusive, and that the learned Judge erred in so directing the jury.

The cases of *McCullough v. Burnham*; *McArthur v. Vanderburgh*;<sup>\*</sup> *Tanner v. Bissell*, 21 U.C.R. 553; *Regina v. McGregor*, 19 C. P. 69; *Re Fairbairn and Sandwich East*, 32 U. C. R. 573; and *Boley v. McLean*, 41 U. C. R. 260, were all cases of concession lines and were governed by provisions of the law different from those governing the present case, and consequently cannot aid in its decision.

The provisions of the law governing this case are sections 34, 35, 36, and 37 of R. S. O. 1877 ch. 146, for the survey was performed in the years 1883 and 1884, when these provisions were in force.

Section 34 provides that "Stone monuments, or monuments of other durable materials, shall be placed at the several corners, governing points, or off-sets of every township already surveyed, or after this Act takes effect from time to time surveyed, and also at each end of the several

<sup>\*</sup> These two cases are not reported; they are referred to in the report of *Boley v. McLean*, 41 U. C. R. 260.

Judgment. concession lines of such townships ; and lines drawn in the manner hereinafter prescribed from the monuments so erected, shall be taken and considered to be the permanent boundary lines of such townships and concessions respectively.”

Armour, C.J.

Section 35 provides that “ The monuments to be placed as above mentioned shall be so placed under the direction and order of the Commissioner of Crown Lands.”

Section 36 provides that “ The courses and lengths of the said boundary lines, so ascertained and established, shall on all occasions be the true courses and lengths of the boundary lines of the said townships and concessions, whether the same do or do not, on actual survey, coincide with the course and lengths in any letters patent of grant or other instrument mentioned and expressed in respect of such boundary lines.”

And section 37 provides that “ It shall not be necessary for the Commissioner of Crown Lands to proceed to carry the provisions of the three last preceding sections of this Act into execution, until an application for that purpose has been made to the Lieutenant-Governor, etc.”

Monuments to be placed in compliance with these provisions must be placed at the true corners, governing points, or off-sets, or at the true ends of the concession lines, and it is only when so placed that lines drawn from them in the manner prescribed by the Act “ shall be taken and considered to be the permanent boundary lines of such townships and concessions respectively.”

And there is nothing in these provisions making the monuments referred to therein conclusive, whether rightly or wrongly placed, and nothing to prevent its being shewn that they have been wrongly placed.

In our opinion, therefore, the conviction must be quashed.

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## [QUEEN'S BENCH DIVISION.]

## RE ELLIOTT V. BIETTE ET AL.

*Prohibition quousque—Division Court—Judgment for \$200.70—Interest—Jurisdiction—Amendment—Part prohibition.*

Where a Division Court has jurisdiction at the time of the institution of an action, but, by the addition of interest accruing during its pendency, judgment is given for an amount beyond the jurisdiction of the Court, prohibition will be granted until the Judge amends the judgment by striking out the excess ; or a partial prohibition will be issued to prevent the enforcement of judgment for the excess.

MOTION by the defendants for prohibition.

This was a suit brought in the 4th Division Court in *Statement.* the county of Bruce to recover the amount of a promissory note and interest. At the time the action was brought, and at the time the cause was tried, the amount of the note and interest was under \$200 and within the jurisdiction of the Division Court ; but the Judge who tried the cause reserved his judgment, and when he came to give it he calculated the amount of the note and interest up to that day, and finding that it amounted to \$200.70, he gave judgment for that amount.

Application was thereupon made by the defendants to the Judge for a new trial, which was afterwards refused ; but no objection was made to the amount for which judgment had been given until the motion for prohibition, and the Judge certified that it was not his intention to have given judgment for any sum beyond the jurisdiction of the Court ; that he did so through inadvertence ; and that if his attention had been called to it upon the application for a new trial, he would have rectified the error.

The motion for prohibition having been made to GALT, C. J., in Chambers, he granted it and ordered prohibition.

The plaintiff appealed from the order, and his appeal was argued on the 28th November, 1891, before the Di-



Argument.      visional Court (ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.).

*W. H. P. Clement*, for the plaintiff. Prohibition will not lie unless the Judge had no power to amend. I contend he had and still has power to amend.

He referred to *Dalby v. Humphrey*, 37 U. C. R. 514; *Re Young v. Morden*, 10 P. R. 276; *Shaw v. Nickerson*, 7 U. C. R. 541; *In re Swire*, 30 Ch. D. 239, 246; *Lawrie v. Lees*, 7 App. Cas. 19, 35; *Re Backhouse v. Bright*, 13 P. R. 117; *Greenizen v. Burns*, 13 A. R. 481; *Bodger v. Nicholls*, 28 L. T. N. S. 441; *Meek v. Scobell*, 4 O. R. 553.

*W. M. Douglas*, for the defendants, referred to *Bank of Ottawa v. McLaughlin*, 8 A. R. 543; *Re White v. Galbraith*, 12 P. R. 513; *Re Mitchell v. Scribner*, 20 O. R. 17; *McCracken v. Creswick*, 8 P. R. 501; *Jordan v. Marr*, 4 U. C. R. 53; *Clinck v. Ontario Loan and I. Co.*, Holmested and Langton's Judicature Act, p. 654; *London and Lancashire Ins. Co. v. British America Ass. Co.*, 52 L. T. N. S. 385; R. S. O. ch. 51, sec. 70 (c).

*Clement*, in reply, referred to sec. 144 of R. S. O. ch. 51.

February 1, 1892. The judgment of the Court was delivered by

ARMOUR, C. J.:—

We see no reason why the learned Judge should not be at liberty to amend the judgment given by him by striking out the seventy cents in excess of the jurisdiction, which was made up solely of interest money which had accrued in respect of the promissory note sued on, pending the suit.

It was no fault of the plaintiff that this sum had accrued before judgment, but was occasioned by the delay of the Court in giving judgment, and the learned Judge has certified that it was not through intention, but through inadvertence, that he gave judgment for this sum in excess of his jurisdiction.

General Rule 118 of the Division Court Rules gives him <sup>Judgment.</sup> the fullest powers of amendment, and we think that <sup>Armour, C.J.</sup> they cannot be better exercised than in correcting this error; and we do not think that he has tied his hands from exercising these powers of amendment merely because he has given this judgment for seventy cents in excess of his jurisdiction: *Re White v. Galbraith*, 12 P. R. 513; *Jordan v. Marr*, 4 U. C. R. 53; *Thomas v. Hilmer*, 4 U. C. R. 527; *Fitzsimmons v. McIntyre*, 5 P. R. 119; *Greenizen v. Burns*, 13 A. R. 481.

We do not think that the mere accrual of interest *pendente lite* upon a claim which, when sued, was within the proper competence of a Division Court, suffices to oust that Court of its jurisdiction, but in such case the amount for which judgment is given must be limited to the jurisdiction of that Court.

In this case the accrual of interest did not, in our opinion, oust the Court of its jurisdiction, but the learned Judge in giving judgment was limited to the amount of two hundred dollars, the limit of the jurisdiction of the Division Court, and in so far, and so far only, as his judgment exceeded that amount was there want of jurisdiction, and prohibition should only go in respect of such excess.

Partial prohibitions have frequently been granted by the Courts, and we think that the principle upon which such partial prohibitions have been granted, as indicated by the authorities, warrants us in granting a partial prohibition in this case prohibiting the proceeding in the Division Court for the seventy cents by which the judgment exceeds the jurisdiction of that Court.

The interest is clearly severable from the principal money, and the excess of interest in excess of the jurisdiction is clearly severable from that within the jurisdiction; and no practical difficulty stands in the way of a partial prohibition, nor do we think any legal difficulty stands in the way of it: *Comyns's Dig., Prohibition*, F. 17; *Gerey's Case*, R. Mo. 873; *Middleton v. Lawte*, R. Mo. 879; *Betsworth v. Betsworth*, Sty. 10; *Lush v. Webb*, 1 Sid. 251;

Judgment. *Free v. Burgoyne*, 5 B. & C. 400 ; *Re Walsh*, 1 E. & B. 383 ; *Kerkin v. Kerkin*, 3 E. & B. 399.

The appeal must therefore be allowed, and a prohibition *quousque*, that is, until the learned Judge shall amend his judgment striking out the seventy cents, issue ; or a partial prohibition issue prohibiting the enforcing of the judgment so far as the excess of seventy cents is concerned ; and there will be no costs of this motion, nor of the motion in Chambers.

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[COMMON PLEAS DIVISION.]

ALLEN V. THE FAIRFAX CHEESE COMPANY.

*County Court—Jurisdiction—Partnership—Action by partner to recover his share of money paid firm—Prohibition.*

A County Court has jurisdiction, where the amount of the claim does not exceed the ordinary jurisdiction of the Court, to entertain an action by a partner against his co-partners for a purely money demand, which is part of the partnership assets, although it may involve the taking of the partnership accounts.

Statement.

THIS was an application for a prohibition to the County Court of the County of Leeds and Grenville, against further proceedings being taken in that Court in this action.

The facts appear in the judgment.

November 24th, 1891. *Aylesworth*, Q.C., supported the application.

*Beaumont*, contra.

January 4, 1892. STREET, J. :—

The plaintiffs and a number of other persons entered into partnership on 17th February, 1890, under the name of the Fairfax Cheese Company, and the partnership was carried on until the destruction by fire of the factory and its contents. An insurance against fire existed, and \$600

has been paid to the partnership by the insurance company. The object of this action is to recover the plaintiff's share of this insurance money from the partnership.

Judgment.  
Street, J.

The prohibition is sought upon the ground that the relief sought is of a purely equitable nature, and that the County Courts have no equitable jurisdiction. See *Re McGugan v. McGugan*, 21 O. R. 289; *Whidden v. Jackson*, 18 A. R. 439.

The defendants are not an incorporated company, but simply a partnership, and the plaintiffs being members of the partnership are therefore in the position of being defendants as well as plaintiffs in the action. That, however, is a matter which, even in a Court having no equitable jurisdiction, can be set right by amendment, and affords no ground for prohibition.

The substantial question is, whether, supposing the action to have been brought by the plaintiffs against their co-partners by name, claiming their share of this insurance money, the jurisdiction of the Court would be ousted by the defence that the plaintiffs and defendants were partners and that the sum claimed was assets of the partnership.

I can see no reason for thinking that this would be the case. The claim of the plaintiffs is a purely money demand, and, although it may involve the taking of the whole partnership account, there is still nothing in that circumstance sufficient of itself to oust the jurisdiction of a Common Law Court. The jurisdiction of Courts of Common Law and of Equity, when a distinction between them existed, was technically and nominally concurrent in regard to actions by one partner against another to take the partnership accounts after a dissolution; practically all such matters were disposed of by the Court of Equity, and proceedings taken for the purpose in the Common Law Courts were stayed by injunction upon the ground that the remedy there was inadequate; but I cannot find that the jurisdiction of the Common Law Courts to entertain such actions was denied.

I think therefore there is no ground for prohibition, and that the motion must be dismissed with costs.



## [COMMON PLEAS DIVISION.]

## ROBERTSON ET AL. V. LONSDALE ET AL.

*Bills of exchange and promissory notes—Endorsement—Guarantee—Trust.*

A promissory note, for value received, at three months, was made by one of the defendants to the order of the testator of the plaintiffs. Some years afterwards the maker conveyed his farm to his son, the other defendant, on a verbal understanding, unknown to the payee, that the son was to pay the father's debts, including the note. After the conveyance, the payee having pressed the father for security, the son, without any endorsement of the note by the payee, wrote his name on the back of it, all parties supposing that he had thereby rendered himself liable as endorser. Subsequently he made a payment on account to the payee.

In an action against father and son :—

*Held*, that no liability attached to the son, either as endorser or guarantor, or as trustee of the property conveyed to him.

**Statement.**

THIS was an action tried before STREET, J., without a jury, at Perth, at the Autumn Assizes of 1891.

The action was on a promissory note made by James Lonsdale, dated the 3rd of March, 1877, payable to the order of John Robertson, three months after date, for the sum of \$326.57 with interest at eight per cent., and endorsed by the defendant John Lonsdale, a son of the maker.

The action was commenced on the 6th of June, 1890.

The facts, so far as material, are set out in the judgments.

The learned Judge reserved his decision, and subsequently delivered the following judgment :

September 21st, 1891. STREET, J. :—

This action was tried before me, at Perth, on 8th September, 1891.

The plaintiffs are the executors of John Robertson, deceased. The defendants are James Lonsdale and John Lonsdale.

The action is against James Lonsdale as maker, and John Lonsdale as endorser of a promissory note, dated 3rd March, 1877, for \$326.57, payable three months after date

to the order of John Robertson. It was sworn that a sum of fifty dollars was paid by John Lonsdale on account of the note, on 28th June, 1884. The writ in this action was issued on the 6th June, 1890.

Judgment.  
Street, J.

The evidence shewed that James Lonsdale had incurred the debt to John Robertson for which the note was given: that long afterwards Robertson had asked him for security, and that John Lonsdale had written his name upon the back of the note, the parties apparently supposing that his doing so would make him liable upon it. Within a year or two, either before or after making the note, James Lonsdale conveyed some farm property to John Lonsdale, and there is some evidence that there was an expectation on the part of the father, and perhaps of an undertaking on the part of the son, John, that he would pay his father's debts as a part of the consideration for the conveyance. There is also evidence that John verbally promised the payee of the note that he would pay the amount of it, and the payment by him of \$50 on account, was proved.

The plaintiffs upon these facts admitted that their claim against the father was barred by the Statute of Limitations; but claimed to be entitled to recover against the son John Lonsdale.

I am unable to see any grounds for giving judgment in the plaintiff's favour.

The defendant, John Lonsdale, did not become liable as endorser of the note, because it was payable to the order of John Robertson who never endorsed it, so that John Lonsdale did not become a party to it by endorsing it. The debt secured by the note was the debt of James Lonsdale, and there is no promise in writing on the part of John to pay it. No trust was created for the payment of this debt by the conveyance from the father to the son of the farm—there was at most a promise by the son given to the father to pay the debt to the creditor as the consideration for the conveyance from the father to the son of the farm.

I do not understand the cases to go so far as to

Judgment. hold that these circumstances are sufficient to create a  
Street, J. trust, in the absence of any understanding between the father and the son that the farm should be charged with the payment of the debts, or should constitute in any way a fund out of which the son should pay them. The authorities are collected in *Henderson v. Killey*, 17 A. R. 456. See also *Canadian Bank of Commerce v. Marks*, 19 O. R. 450.

The action must be dismissed with costs.

The plaintiffs moved on notice to set aside the judgment entered for the defendant, John Lonsdale, and to enter judgment for the plaintiffs.

In Michaelmas Sittings, November 30th, 1891, of the Divisional Court (composed of GALT, C. J., and MACMAHON, J.), *Middleton* supported the motion. The defendant John Lonsdale is liable as a guarantor; at all events a trust was created for the payment of the debt by the conveyance from his father to him, and oral evidence is sufficient in proof of the liability: *Daniell on Negotiable Instruments*, 4th ed., secs. 707-14; *Singer v. Elliott*, 4 Times' L. R. 34, 524; *McPhee v. McPhee*, 19 O. R. 603; *Henderson v. Killey*, 17 A. R. 456; *Fullam v. Adams*, 37 Verm. 391, 397; *Orrell v. Coppock*, 2 Jur. N. S. 1244; *Brandt on Suretyship*, sec. 51 *et seq.*; *Baylies on Sureties*, p. 70; *Fitzgerald v. Dressler*, 7 C. B. N. S. 374, 392; *Gandy v. Gandy*, 30 Ch. D. 57; *Mitchell v. City of London Assurance Co.*, 15 A. R. 262; *Mulholland v. Merriam*, 19 Gr. 288.

No one appeared for the defendant John Lonsdale.

February 1st, 1892. MACMAHON, J.:—

The note in question was given by James Lonsdale for an indebtedness incurred by him to John Robertson. James Lonsdale, some few years after the date of the note, conveyed his farm, which was all the real estate he possessed, to his son, John Lonsdale, on a verbal under-

standing or agreement that the latter should pay his father's debts, and, amongst them, the debt in question to Robertson.

Judgment.  
MacMahon,  
J.

After the conveyance by James to John Lonsdale, Robertson was pressing James Lonsdale for security, and John endorsed his name on the back of the note, that being accepted by Robertson as security; and, from what afterwards took place, John Lonsdale evidently considered himself as being liable by reason of his having so put his name on the note, for on the 28th of June, 1884, he paid \$50 on account of the note.

It was not pretended that John could be held liable as endorser by merely writing his name on the back of an overdue note. But it was urged he became a guarantor, or that he was a trustee of the property conveyed to him by his father for the payment of his father's indebtedness, and so liable to account to the plaintiff. As an authority in support of the plaintiffs' contention as to John being a guarantor, we were referred to the case of *Singer v. Elliott*, 4 Times L. R. 34 and 524, which was an action on a bill of exchange, payable to the drawer's own order and accepted by the drawees. Before it was sent back to the plaintiff the defendant was induced to sign his name across the back. The Court of Appeal held that the defendant clearly was not an endorser of the bill. The bill had not been negotiated. It was drawn to the drawer's order, and it did not become negotiable until it had been endorsed by him. The defendant, therefore, was not liable upon the bill as an endorser. But the day before the maturity of the bill he wrote a letter in which he mentioned his having guaranteed the bill; and the Court, taking the defendant's letter and reading it with the bill itself, held there was sufficient to satisfy the Statute of Frauds, and that the defendant was liable on the bill as guarantor.

In the present case there was no agreement or writing to satisfy the statute so as to make John Lonsdale liable as guarantor or surety for the payment of the note.

The case of *McPhee v. McPhee*, 19 O. R. 603, was cited by



Judgment. Mr. Middleton. But that was a case where a partnership  
MacMahon, having borrowed money from the plaintiff for partnership  
J. purposes, one member of the firm gave to the plaintiff a  
non-negotiable promissory note, upon the back of which  
the other member of the firm signed his name.

The proper legal interpretation to have put upon the transaction in that case was that the party putting his name on the back of the note, being liable on the consideration for which the note was given, might be treated as a joint maker; or it could be regarded as evidence of an account stated between the plaintiff, to whom the amount represented by the note was due, and the defendant who had put his name on the back thereof: *Gould v. Coombs*, 1 C. B. 543.

Under some of the American authorities a person writing his name on the back of a non-negotiable note without more would be regarded as a guarantor; but I was in error in holding that under the English or Canadian authorities he could so be considered.

As to the other ground on which it was endeavoured to shew that John Lonsdale should be held liable, *i.e.*, on the ground of his being a trustee for the plaintiff. There is nothing to support this. John Lonsdale at the time his father conveyed the farm to him agreed to pay the latter's debts, but there was no communication made to Robertson the plaintiff, by John, that he was accepting the farm from his father on any trust; nor was there any agreement whereby James Lonsdale was to be released from his liability to Robertson and his son John substituted as debtor. James Lonsdale's liability was still considered as subsisting and he was sued in this action as maker of the note in question.

An agreement between James Lonsdale and his son John, that John should pay Robertson, would give Robertson no right of action against John. See judgment of Lindley, L. J., in *Re Rotherham Alum, etc., Co.*, 25 Ch. D. 103, at p. 111; *Re Empress Engineering Co.*, 16 Ch. D. 125, judgment of the Master of the Rolls; *Henderson v.*

*Killey*, 17 A. R. 456; affirmed in the Supreme Court, vol. 18, p. 698, *sub nomine Osborne v. Henderson*.

Judgment.  
MacMahon,  
J.

The motion must be dismissed, but it will be without costs.

GALT, C. J., concurred.

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[COMMON PLEAS DIVISION.]

REGINA V. WILLIAM BITTLE.

*Constitutional law—Provincial crimes—Power of Legislature to enact procedure—Competency of defendant to give evidence.*

Notwithstanding the reservation of criminal procedure to the Dominion Parliament in sub-sec. 27 of sec. 91 of the "British North America Act," a Provincial Legislature has power to regulate and provide for the course of trial and adjudication of offences against its lawful enactments, in this case a breach of "The Liquor License Act," even though such offences may be termed crimes; and therefore to regulate the giving of evidence by defendants in such cases, which they have done by R. S. O. ch. 61, sec. 9, providing that where the proceeding is a crime under the provincial law, the defendant is neither a competent nor compellable witness.

THE defendant was convicted by the police magistrate of the city of Toronto, for selling liquor without a license contrary to sec. 70 of "The Liquor License Act," R. S. O. ch. 194. Statement.

This was a motion to quash the conviction upon the ground that the evidence of the defendant tendered on his own behalf at the trial was improperly rejected by the magistrate, the defendant's contention being that under the provisions of the Canada Temperance Act, R. S. C. ch. 106, secs. 114 and 120, he was entitled to give this evidence.

In Michaelmas Sittings, 1891, before a Divisional Court composed of GALT, C. J., and MACMAHON, J., *E. A. DuVernet* supported the motion.

## Argument.

The evidence of the defendant was improperly refused : R. S. C. ch. 106, sec. 114 (Canada Temperance Act), provides that the defendant shall be competent and compellable to give evidence under any of the Acts or laws mentioned in the 120th section of the Act. The word "compellable" in section 114, was struck out by 51 Vic. ch. 34, sec. 13 (D.). Amongst the Acts mentioned in the 120th section are "any Act in force in any province respecting the issue of licenses for the sale of fermented or spirituous liquors." It is said that this Act is *ultra vires* of the Dominion, but the question of *ultra vires* does not arise, as the Province has expressly provided that procedure before justices is to be the same as under the Dominion Acts. See R. S. O. ch. 74, secs. 1 and 9. The Dominion alone has power to deal with the criminal procedure. See sub-sec. 27, sec. 91 of British North America Act: *Regina v. Roddy*, 41 U. C. R. 291; *Regina v. Lawrence*, 43 U. C. R. 164. An offence against the Liquor License laws has been held to be a crime, and is therefore clearly within the jurisdiction of the Dominion. See also *Regina v. Hart*, 20 O. R. 611, followed in *Regina v. Becker*, 20 O. R. 681.

*J. R. Cartwright*, Q. C., contra. Secs. 114 and 120 are *ultra vires* of the Dominion Parliament. The Province alone have the right to regulate the procedure under "The Liquor License Act." The provisions of the Canada Temperance Act cannot be imported into "The Liquor License Act" proceedings, which are regulated by their own provisions and by the "Evidence Act," R. S. O. ch. 74. If we have an Ontario Act excepting cases of crime from cases where the defendant is competent or compellable, the Ontario Act must be held to apply. If the Dominion Act purports to deal with the admissibility of evidence in cases under Provincial Acts, it is *ultra vires*: *Regina v. Wason*, 17 A. R. 221.

*DuVernet*, in reply. In any case the defendant is competent. If the Legislature has the power to deal with the matter, if the offence is not a crime, then under the Ontario Evidence Act the defendant is a competent witness. If it

is a crime, then under the Canada Temperance Act the Argument. defendant is competent. The jurisdiction of the Dominion and the Provinces often overlap. All that was contended in *Regina v. Wason*, was that the Dominion had not the exclusive authority to create criminal procedure. The presumption is strong in favour of the validity of the Act. See judgment of Burton, J. A., in *Regina v. Wason*, at p. 235. See also *Regina v. Boardman*, 30 U. C. R. 553; *Regina v. Meyer*, 11 P. R. 477.

The Minister of Justice of the Dominion of Canada, although duly notified, did not appear.

February 1, 1892. MACMAHON, J. :—

The 120th section of the Canada Temperance Act provides that: "Every one who, having violated any of the provisions of this Act or of any Act in force in any Province respecting the issue of licenses for the sale of fermented or spirituous liquors or of *The Temperance Act of 1864*, compromises, compounds or settles, or offers, or attempts to compromise, compound, or settle the offence with any person or persons with the view of preventing any complaint being made in respect thereof, or if a complaint has been made, with the view of getting rid of such complaint, or of stopping or having the same dismissed for want of prosecution or otherwise, is guilty of an offence against this Act, and on conviction thereof shall be liable," etc.

By section 114, as amended by 51 Vic. ch. 34, sec. 13 (D.), on the trial of any proceeding, matter, or question under any of the Acts or laws in the 120th section of the Act, the person opposing or defending shall be competent to give evidence in such proceeding, matter or question.

It was urged by counsel for the defendant, that the offence with which defendant was charged being a "crime" the Dominion Parliament had full power to declare whether a defendant should or should not be a competent witness in a criminal proceeding; or, in other words, that this



Judgment. being a crime, the Dominion Parliament alone had power  
MacMahon, to regulate the procedure.  
J.

When the constitutionality of the Canada Temperance Act was before the Privy Council in *Russell v. The Queen*, 7 App. Cas. 829, the argument of Mr. Benjamin for the appellant is thus referred to in the judgment, at p. 840: "It was argued by Mr. Benjamin that if the Act related to criminal law, it was provincial criminal law, and he referred to sub-sec. 15 of sec. 92 (B. N. A. Act) viz.: 'The imposition of any punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects mentioned in this section.' No doubt this argument would be well founded if the principal matter of the Act could be brought within any of these classes of subjects; but as far as they have gone, their Lordships fail to see that this has been done."

In *Hodge v. The Queen*, 9 App. Cas. 117, where the validity of certain clauses in "The Liquor License Act, 1877," were attacked, their Lordships in their judgments, at p. 132, after stating that the Legislature of Ontario had authority to make laws for the Province and for provincial purposes in relation to matters enumerated in sec. 92, said: "Within these limits of subjects and area the local legislature is supreme," etc. And they also affirmed what had been said in our own Courts in *Regina v. Boardman*, 30 U. C. R. 553, and in other cases—and also in the Province of Quebec in the cases hereinafter referred to—that sub-sec. 15 of sec. 92, gave to the provincial legislature power to punish by fine, penalty, or imprisonment,—which might include hard labour,—for infractions of "The Liquor License Act."

In *Russell v. The Queen*, the Privy Council having adopted Mr. Benjamin's view that if the subject of the Act he was discussing had been within the class of subjects coming within sub-sec. 15 of sec. 92, the enactment might be designated as "provincial criminal law," we have therefore by the highest appellate tribunal a definition of these criminal laws which, as said in *Hodge v. The Queen*, at p. 133, are "not in conflict with No. 27 of sec. 91."

The offence in this case being one created by the Legislature comes under the "provincial criminal law," and the procedure regulating the manner in which an offence under such law may be proved is not "the procedure in criminal matters" referred to in sub-sec. 27 of sec. 91, as coming "within the exclusive legislative authority of the Parliament of Canada."

Judgment.  
MacMahon,  
J.

The question as to what definition should be given to an offence created by the local legislature under the License Act, and to whom was confided the authority to regulate the procedure for such offences, was considered in the Court of Queen's Bench of Quebec, in 1872, in the case of *Pope v. Griffith*, 2 Cart. 291, where Ramsay, J., said, at p. 295: "Whatever may be the definition of a crime, I would remind those who lean too much upon definitions of their danger; it will not be denied that, in one sense of the word, the act of which appellant is accused (keeping liquors for sale without a license), is a crime; but it is equally plain that it is not a crime in the sense of sub-section 27, sec. 91, B. N. A. Act. \* \* Sub-section 16 of section 92, reserves to the local legislature generally, the right to make laws affecting all matters of a merely local or private nature in the Province. What can be more local than the procedure to give force to a local law? If this view be correct, it is not a question of clashing, and the provision of section 91, giving superior authority to the enumeration of the powers of Parliament, does not apply. The powers are perfectly distinct. Parliament makes the laws of procedure affecting the criminal law which it enacts, each of the legislatures makes the laws of procedure affecting the penal laws which they enact respectively."

The same question was discussed in *Ex p. Duncan*, 2 Cart., p. 297, where an application was made for a writ of *certiorari*, to bring up a conviction by a district magistrate under the peddler clauses of the Quebec Act, 34 Vic. ch. 2, commonly known as the Quebec License Act. Mr. Justice Dunkin in referring to the authority

Judgment. of the local legislature, under section 92, said: "Every local  
MacMahon, legislature, without let or hindrance from Parliament—  
J. and therefore without need of aid from Parliament—can impose punishment by fine, penalty or imprisonment for enforcing certain laws which it alone can make. To hold that while it can freely qualify infractions of such laws as punishable, and assign to each its measure of punishment by fine, penalty or imprisonment, the procedure requisite in order to the infliction of such punishment (as being essentially a procedure in a criminal matter), must be such only as Parliament may see fit to provide, would be to hold the doubly untenable doctrine that (on the one hand) every local legislature can at will create certain crimes and assign certain criminal punishments, and that (on the other hand) Parliament can at will admit such crimes and punishments within or exclude them from the range of procedure needed to repress such crimes by real infliction of such punishments. Whatever infractions of law, whether as matters of Dominion or Provincial legislation, Parliament sees fit to designate as crimes, it—and it alone—can so declare, and as such punish, and to that end regulate procedure. Whatever infractions of any provincial law coming within the purview of this 92nd section Parliament may not see fit thus to deal with, the interested Province may punish by fine, penalty or imprisonment; but its so doing does not make the offence to be thus punished a crime, nor the procedure laid down in order to its punishment procedure in a criminal matter. On the contrary, such whole matter must remain a civil matter within what is here the true meaning of these respective terms."

The clause last cited was commented on with approval by Hagarty, C. J., in *Regina v. Wason*, 17 A. R. at p. 232, where he said: "Notwithstanding the reservation of criminal procedure to the Dominion Parliament, must we not hold that there must be a necessary implication of power to the Legislature so far to regulate criminal procedure (if that be its proper name) as to provide for the course of trial and adjudication of offenders

against its lawful enactments? I think we can well keep the two jurisdictions distinct, and as to each to adhere to the rule that where either has the right to legislate on a named subject, it must by necessary implication be held that all powers are given fully to carry out the object of the enactment although subjects such as civil rights, and procedure, civil or criminal, may be apparently interfered with. The exclusive right to deal with the specified subjects remains wholly unaffected—the carrying the legislation into practical effect and providing necessary penalties for its observance is alone in question.”

Judgment.  
MacMahon,  
J.

This language is repeated by the learned Chief Justice in *Attorney-General of Canada v. Attorney-General of Ontario*, 19 A. R. 31, in which he states he fully adheres to the views thus expressed, and adds this as the epitome of the judgment of the Court on this point in *Regina v. Wason*: “We held in effect that the Legislature had the right to provide the mode of procedure applicable to the final hearing and determination of the guilt or innocence of parties violating its laws.”

Having regard to the definition in *Russell v. The Queen*, 7 App. Cas. 829, that enactments of the local Legislature imposing penalties under sub-sec. 15, sec. 92, are “provincial criminal laws,” it is manifestly clear from the authorities that the procedure by the tribunals intrusted with adjudicating on the offences so created cannot be prescribed by the Dominion Parliament.

Mr. DuVernet urged that the enactment of sec. 1 of R. S. O., ch. 74, was an express recognition and adoption by the local Legislature of sec. 217 of the Criminal Procedure Act (R. S. C. ch. 174), and of the Dominion Parliament’s right to declare whether or not a defendant shall be a competent witness in a criminal proceeding; and that sub-sec. 1 was likewise an adoption of the procedure under the Canada Temperance Act as to the competency of defendants accused of offences under Provincial license laws to give evidence on their own behalf.



Judgment.

MacMahon,  
J.

From a careful consideration of sec. 1 of R. S. O., ch. 74, and also of the Summary Convictions' Act, R. S. C. ch. 178, it is, I think, clear that the above section of the Ontario Act refers to the proceedings to be taken for a violation of a Provincial law to those prescribed by the Summary Convictions Act which provides for compelling the attendance of parties or witnesses; the manner of hearing the complaint; for the conduct of the Court; the taking and estreating of recognizances, etc., etc., all of which are mentioned in sec. 1 of the Ontario Act. There is not, however, in the Summary Convictions' Act any provision as to parties defendant being competent witnesses.

The 120th section of the Canada Temperance Act has no application to Provincial liquor license, and only applies to the compounding of offences under the Act. Consequently section 114 cannot control the procedure respecting the admissibility of the evidence of a defendant prosecuted for an offence under the Ontario license law. The offence here being a crime under "Provincial criminal law," it comes within the authority of the local legislature to provide the procedure for the trial of offenders against such laws, which they have done, so far as dealing with the competence of defendants to give evidence on their own behalf is concerned, by R. S. O. ch. 61, sec. 9, where, if the trial or proceeding before the magistrate is not a crime, the defendant is competent and compellable to give evidence. Where it is a crime a defendant is neither competent nor compellable to give evidence.

The *certiorari* must, therefore, be superseded, and the motion dismissed with costs.

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## [COMMON PLEAS DIVISION.]

THE BANK OF BRITISH NORTH AMERICA V. GIBSON ET AL.

*Equitable assignment—Order for payment of money—Estoppel.*

The contractor for building a church, being indebted to D. for materials furnished therefor, gave him the following order on the defendants, who were the building trustees, and of which they were duly notified: "Pay to the order of D. the sum of \$306 out of certificate of money due me on 1st June for materials furnished to above church." This the defendants refused to accept, and on 31st May paid, out of moneys arising out of the contract, an order for a larger sum, made on that date in favour of another person, under an arrangement made by them with the latter alone:—

*Held*, that there was a good equitable assignment in favour of D. of money due on the 1st June; and that defendants by the payment of the other order were estopped from denying that there were sufficient moneys then due to the contractor to cover his order.

THIS action, which was brought to establish two equitable Statement. assignments, one for \$306, and the other for \$260.41, was tried before FALCONBRIDGE, J., at London, at the Spring Assizes of 1891.

The case arose from the following circumstances: The defendants were trustees for the building of a church, and had a contract with the firm of William Scott & Son for the performance of certain work connected with the church. William Scott & Son being indebted to J. C. Dodd & Son for materials furnished for the work, gave two orders, the one which is necessary to be mentioned, so far as this report is concerned, was as follows:

BUILDING TRUSTEES.

LONDON, May 15th, 1890.

*Presbyterian Church, Petrolia.*

\$306.

Pay to the order of J. C. Dodd & Son, the sum of three hundred and six dollars out of certificate of money due me on the first of June, for material furnished to above church.

WM. SCOTT &amp; SON.

Each of these orders was endorsed by J. C. Dodd & Son to the Bank of British North America; and it was to enforce payment of them that this action was brought. There was a sum remaining unpaid on the contract, but there were

**Statement.** several mechanics' liens filed, on which proceedings were being taken, and the defendants were willing to pay the balance due to Scott & Son into Court to satisfy all claims against them.

The additional evidence is set out in the judgments.

The learned Judge reserved his decision, and subsequently delivered the following judgment:

24th August, 1891. FALCONBRIDGE, J.:—

The first order, namely, the one for \$306, is, in my opinion, clearly an equitable assignment and not a bill of exchange. The words used plainly make the order payable out of a particular fund which fund is described and designated in a twofold manner, *i.e.*, "out of certificate of money due me on the first of June," and "for material furnished to above church."

The defendant Gibson who signed Scott & Co.'s contract as chairman of the building committee, and who acted throughout as their agent or manager, had notice of this instrument both by its presentation for acceptance between 16th and 19th May, when it is proved that he had it in his hand and looked at it, and by letter of 29th May, the mailing of which is positively sworn to; and Mr. Gibson's daughter, who gets some of his letters at the post-office, was not called.

There was then "a clear intimation to the defendant that to that extent the contractor had parted with his interest in the moneys accruing under the contract, and the defendants after that notice would deal with the original creditor at their peril:" Per Mr. Justice Burton in *Hall v. Prittie*, 17 A. R. 306, at p. 308.

And this is none the less the position of affairs, although Mr. Gibson might not have apprehended the legal effect of the instrument, or although defendants might be entitled under the contract to temporarily retain twenty-five per cent. of the price of the work then done and materials then provided.

As to this order plaintiffs are entitled to judgment. It <sup>Judgment.</sup> did not remain money due to the contractor, and defen- <sup>Falconbridge,</sup> dants cannot set up the Mechanics' Lien Act as a shield. <sup>J.</sup>

The defendants moved to set aside the judgment entered for the plaintiffs, and to enter the judgment for the defendants.

In Michaelmas Sittings, November 24th, 1891, of the Divisional Court (composed of GALT, C. J. and MACMAHON, J.), *Geo. Moncrieff*, Q.C., supported the motion, and referred to *Hall v. Prittie*, 17 A. R. 306; *Lamb v. Sutherland*, 37 U. C. R. 143; *Shand v. DuBuisson*, L. R. 18 Eq. 283; *Re Farrell*, 10 Ir. Ch. R. 304; *Farquhar v. Corporation of Toronto*, 12 Gr. 186; *Brice v. Bannister*, 3 Q. B. D. 569.

*Macbeth*, contra, referred to Kehoe's Choses in Action, 43-4.

February 1st, 1892. GALT, C. J. :—

As respects the first order, viz., that for \$306, the objections taken are :

1. That the order for \$306, did not operate as an assignment of the moneys due by the defendants to Scott & Son on the contract.

The terms of the order itself are an answer to this objection. The order is addressed to "The Building Trustees, Presbyterian Church, Petrolia," and is as follows : Pay to \* \* , out of certificate of money due me on the first of June for material furnished to above church."

2. That no proper notice of such order was given to the defendants. It was admitted by Mr. Gibson that he was chairman of the trustees, and it was clearly proved that the order had been presented to him and he had refused to accept it; this was admitted by him; I will refer presently to his evidence.

3. That, admitting such order to be an assignment, it could only have effect provided the money was due on first June, 1890, by the defendants to Scott & Son, and as



Judgment. no money was due on that day, or at any time between  
Galt, C.J. the date that plaintiff alleged notice was given to the  
defendants and the said date, the plaintiffs cannot  
recover.

According to the evidence of Mr. Campbell, who is the manager of the Bank of Toronto, Petrolia, to whom the order had been sent for presentation, he handed it to Mr. Gibson on 19th May, who took it in his hand and said he would not accept it. Of course in a case like the present, the rights of a transferee of a chose in action are not affected by the consent or refusal of the person to whom it is directed; it is sufficient if he has notice.

The rights of the holders of equitable assignments of money payable on contracts, are most fully discussed in the case of *Brice v. Bannister*, 3 Q. B. D. 569; and bearing in mind the following evidence given by Gibson, which was as follows :

Q. Now then, when that order was presented to you by Mr. Campbell, he handed it to you and you read it? A. I am not sure that I read it. Q. He says he gave it into your hand, and that you had time to read it? A. It was only a very short time I had it in my hand. Q. You knew that it was in connection with the church? A. I knew afterwards, yes. Q. You did not see your committee before you refused to accept it? A. No. Q. You off-hand declined? A. Off-hand declined, knowing that he was over-paid. Q. Then on \* \* a very few days afterwards you accepted, or did you know anything about the Kerr order at all? A. Yes, I did. Q. If Mr. Scott was over-paid on the 15th, why did you accept an order on the 31st for \$444? A. We had our reasons for accepting that order. Q. Why did you do it? A. For a reason. Q. What reason? A. The reason was that Scott could not have got the goods if we had not agreed to pay about \$400. Q. Was this order for goods supplied after the date of the order or before? A. Before. Q. Then the goods were supplied at the date of the giving of that order? A. Before. Q. Then it could not have been in order to get the goods that you gave the order, accepted the order? A. We had agreed to go that much.

And that order was paid on 21st May, there can, in my opinion, be no doubt the plaintiffs are entitled to recover as to the \$306. Gibson had notice of that order, and subsequently, on 31st May, accepted and paid an order drawn as follows :

PETROLIA, May 31st, 1890.

Judgment.

*Messrs. W. R. Gibson & John Murdoch,*

Galt, C.J.

Gentlemen—Please pay J. J. Kerr the sum of \$444, and charge to us on Church contract, and oblige,

Yours truly,

W. SCOTT &amp; SON.

It is plain from Gibson's own evidence, this payment was made *not* in consequence of any arrangement with Scott, but in accordance with an agreement between Gibson and Kerr. No order had been given, so there had been no assignment. As said by Cotton, L. J., in the case to which I have referred, at p. 576: "The letter of 27th October, is a good equitable assignment by Gough to the plaintiff of money to the extent of £100, which might become due under his contract with the defendant. To this extent he thereby anticipated the moneys payable from the defendant to him, and Gough became incompetent to deal with these moneys to plaintiff's prejudice, and the defendant, after notice of the letter, could not come to any agreement with Gough dealing with or anticipating these moneys to the prejudice of the plaintiff."

In the present case, the position of the plaintiffs is very much stronger. At the time when the contract was finished, there was and now is a sum unpaid much more than sufficient to pay the amount of this assignment.

MACMAHON, J. :—

I agree with the learned Chief Justice that the document referred to in the fourth paragraph of the statement of claim is an order limiting the payment out of a particular fund, namely, "out of certificate moneys due on the 1st of June," and is therefore a valid equitable assignment being a specific appropriation in favour of the assignee out of such fund payable to the assignor on the 1st of June.

It was contended there was nothing coming to Scott & Son, the assignors, on the 1st of June, and therefore no certificate could issue in their favour on that date.

Judgment. In *Brice v. Bannister*, 3 Q. B. D. 569, the order was to  
MacMahon, J. pay "the sum of £100 out of moneys due or to become  
due from you to me." In *Buck v. Robinson*, 3 Q. B. D. 686, the order was to pay "the sum of £40 now due, or that hereafter may become due." In *Walker v. Bradford Old Bank*, 12 Q. B. D. 511, by the deed of assignment in that case all moneys then or hereafter to be standing to the credit of the assignor at a bank were assigned to a trustee on trust for the assignor for his life, and after his death on other trusts.

The debt or chose in action must exist at the time of the assignment, or arise afterwards by virtue of a contract existing at the time of the assignment: *Hall v. Prittie*, 17 A. R. 306, at p. 310. So that if this assignment had not been confined to the moneys arising from the certificate to which the assignor assumed he was entitled on the 1st of June, the amount would have been payable out of any further sums accruing due to the assignor arising out of the contract then existing between himself and the defendants. It is, I consider, quite clear on principle, that the assignment only attaches to the moneys payable under the certificate. To this Scott & Son would or might have been entitled but for the act of the defendants in paying this draft of Scott & Son in favour of J. & J. Kerr for \$444 drawn and paid on the 31st of May—the day prior to that on which the certificate might have issued. This draft was for goods supplied by Kerr to Scott & Son some time prior to notice of the assignment herein to Gibson. Besides this, Gibson said to William Scott "we" (defendants) "have an order against you for money you have assigned to the extent of \$306."

In the face of these facts the defendants ought not to be allowed to say that Scott & Son were not entitled to a certificate on the 1st of June.

I agree that the judgment must stand for the plaintiffs on the fourth paragraph of the statement of claim for \$306.

## [COMMON PLEAS DIVISION.]

## REGINA V. WESTLAKE.

*Intoxicating liquors—Selling without license—Evidence of purchase of day's receipts—Costs.*

The defendant purchased for \$25, from a duly licensed hotel-keeper the day's receipts of the bar, and at the close of the day had paid over to to him such receipts:—

*Held*, that a conviction against defendant for selling liquor without a license could not be maintained, and the conviction was quashed, but without costs.

Remarks on the question of costs in such cases.

THIS was an application to quash a conviction for selling Statement. liquor, etc., without a licence contrary to secs. 49 and 50 of "The Liquor License Act" R. S. O., ch. 194.

The evidence on which the conviction was based was that on the morning of the day in question the defendant was in the hotel of one Emany, a duly licensed hotel-keeper in the town of Whitby, and a discussion arose between them as to the amount of probable receipts from the bar for the day. A political convention being held that day in the town, and it being supposed that there would be a large number of persons there, the defendant offered Emany the sum of \$25 for the day's receipts of the bar, which was accepted, and at the close of the day, the receipts, which were over \$30, were handed by Emany over to the defendant.

In Hilary sittings of the Divisional Court (composed of GALT, C. J., and ROSE, J.) February 6th, 1892, *Aylesworth*, Q. C., supported the motion. There is no offence disclosed here, and none has been committed by the defendant, or by anybody. It cannot be argued that there was any sale of liquors by defendant. [The Court called on the other side.]

*Langton*, Q. C., contra. When the information was laid against the defendant, the inspector who laid it understood he would be able to shew that the defendant had actually taken over the bar and made the sales himself. The evidence failed to establish this, but the inspector contended that the evidence as given disclosed an offence.



Judgment. It shews that the defendant promoted sale of liquors by drumming up persons, customers, to purchase liquor at the bar.

Galt, C.J.

February 6th, 1892. GALT, C. J. :—

We both think the conviction must be quashed. The evidence does not shew any sale by defendant, and no offence against the statute would seem to have been committed by anybody.

*Aylesworth*, Q. C.—The defendant, under the circumstances, should be given his costs. Costs, if awarded are paid out of the general license fund; and it is a very great hardship that defendant should be obliged to go to the expense of quashing a conviction such as this; at all events the prosecution might have come forward when the *certiorari* was moved for and consented to the conviction being quashed, and thus have saved the additional expense of moving for the order *nisi*.

GALT, C. J.—The usual order will have to go to quash the conviction without costs, and with protection against any action to the prosecutor and the magistrate.

ROSE, J.—I have several times referred to the hardship of a defendant being obliged to incur the costs of moving in such cases to get rid of convictions which are clearly unsupportable and especially when the prosecutor might have appeared on the application for the *certiorari* and consented to the conviction being quashed. In such cases it is generally deemed by prosecutors unnecessary to do anything but merely lie by and allow the proceedings to go on and thus the defendant is put to the additional expense of moving. As the practice now stands I am afraid costs cannot be given, but the whole question will have to be considered, and if possible some general rule formulated.

*Conviction quashed with costs.*

## [COMMON PLEAS DIVISION.]

## REGINA V. WESTGATE.

*Conviction—Quashing—No offence shewn—Question of costs considered.*

A conviction under sec. 1 of 52 Vict. ch. 43 (D.), for supplying milk to a cheese factory from which the cream had been removed was quashed, as neither in the evidence or in the conviction was any offence against the Act shewn, it not having been proved that the milk was supplied to be manufactured ; but without costs.

The Court in considering the question of costs suggested that in future with the notice of motion for a certiorari, a notice might also be served stating that unless the prosecution was then abandoned, and further proceedings rendered unnecessary, costs would be asked for, when a strong case would be made for granting the defendant costs in cases in which it would be unjust and unfair to put defendant to such costs.

THIS was a motion to quash a conviction under sec. 1, of <sup>Statement.</sup> 52 Vic. ch. 43, (D.), the complaint being that the defendant supplied to a cheese factory milk from which the cream had been removed.

In Hilary sittings, of the Divisional Court (composed of GALT C.J., and ROSE, J., February 3rd, 1892, *Aylesworth*, Q. C., supported the motion. The conviction is bad for want of a seal ; also because no offence is shewn either in the evidence or upon the face of the conviction, as it was not proved that the milk was supplied to be manufactured, which is the offence under the statute. The applicant should have his costs. The informant was interested in procuring the conviction, as under the statute he gets half the penalty : *Regina v. Hollister*, 8 O. R. 750.

*D. W. Saunders*, contra. I do not think I can support the conviction. The only question, therefore, is one of costs. The inspector is, in a sense, a public official. [ROSE, J.—This conviction being under the Dominion Act, he is merely the officer of his employers. The prosecution is, in a sense, a civil proceeding. If a civil action had been brought, and the plaintiff had failed, he certainly would have to pay the costs.] It cannot be assumed that the inspector was not acting to redress a wrong. The grounds

Argument. on which the conviction is held bad are of a technical character, and costs should not be granted. [ROSE, J.—It does seem hard that the applicant should be put to so much costs in quashing the conviction.]

February 9th, 1892. ROSE, J.:—

Mr. Saunders very properly admitted that the conviction was insupportable for various reasons, among others, that no offence was set out upon its face nor did the evidence show that an offence had been committed against the terms of the statute.

The only question before us was the question of costs. Mr. Aylesworth asked for costs on the ground that the prosecutor was interested in the penalty. I have read the evidence carefully, and it seems to me that there was a *prima facie* case made out of an offence against the statute, if the proof had been completed. That is to say, by the lactometer test it was open to the magistrate to find that skimmed milk had been supplied to the manufactory. The evidence did not show nor did the conviction set out that this was supplied to be manufactured, which was necessary in order to make out an offence within the wording of the section.

Perhaps it might be a fair finding upon the whole evidence that no *mala fides* was shown, but I cannot say that from the tests which were made, a case for investigation was not presented.

It does seem hard that the defendant should have been put to so much costs and trouble in obtaining the quashing of a conviction, which manifestly could not be supported; and it should be a matter for consideration what rule should be adopted in future where the prosecutor after being served with the notice of motion for the *certiorari* does not abandon the further prosecution of the order.

After consultation, I think the following suggestion may be made: viz., that if with the notice of motion for *certiorari*, a notice is served by the defendant upon the

prosecutor that unless the prosecution is forthwith abandoned so as to save the necessity for a further application to the Court to be relieved therefrom, the costs of all the proceedings necessary to obtain relief will be asked, then the defendant will be in a very good position to ask for costs in cases where the putting of the defendant to such costs is unjust and unfair. In the present case, if upon the notice of motion for the *certiorari* being received, the prosecutor had served a notice of intention to abandon further prosecution, the defendant might have been content to have let the matter stand. If, after receiving such notice, the defendant thought best to incur the expense of taking further proceedings to have the conviction quashed, the prosecutor not giving the defendant any further trouble, it may be that costs should not be awarded.

It would be manifestly fair that not only should the prosecutor in hopeless cases abandon the prosecution, but if the defendant desire it, should also give a written consent that the order for conviction should be quashed, thus saving the defendant all unnecessary costs of obtaining an order.

In the present case, having regard to the rules which have governed us on other motions of a somewhat similar character, I do not think we ought to order the prosecutor to pay the costs, as I cannot conclude upon the evidence that there was such an absence of good faith in instituting the proceedings and carrying them on before the magistrate as would afford any evidence of malice.

The order will go for the quashing of the conviction, and without costs. The usual order for protection may also go.

GALT, C. J., concurred.

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Judgment.

Rose, J.



## [QUEEN'S BENCH DIVISION.]

## RE GOULD V. HOPE.

*Prohibition—County Court—Interpleader order—Rule 1141 (a)—Sheriff—Money made under execution—Claim for exemption—Issue between execution creditor and execution debtor.*

A sheriff seized and sold under an execution goods of the plaintiff which the latter claimed as exempt from seizure to the extent of \$100, as being implements of trade, and brought an action against the sheriff in a County Court to recover \$100. While the action was pending and the sheriff still had the proceeds of sale in his hands, he applied to the Judge of the County Court for an interpleader order, which was made, directing an issue between the plaintiff and the execution creditors:—*Held*, on a motion by the execution creditors for prohibition, that notwithstanding that the defendant was a sheriff and that the money in his hands was made by him as sheriff under execution, he was entitled to the benefit of Rule 1141 (a), if the facts before the Judge satisfied him that the case was within that Rule; and the Judge having jurisdiction and the interpleader order being a proceeding in the suit, this Court could not interfere.

**Statement.**

THE defendant was the sheriff of the county of Hastings, and as such sheriff seized and sold under an execution against goods to him directed, and issued out of this Court at the suit of W. R. Brock & Co., certain goods and chattels of the plaintiff, which the latter claimed as exempt from seizure under the execution as being "tools and implements of or chattels ordinarily used in the debtor's occupation, to the value of \$100": (R. S. O. ch. 64, sec. 2, subsec. 6).

The tools and implements which the plaintiff claimed as exempt were of greater value than the sum of \$100, and were sold by the sheriff for more than that sum.

The plaintiff thereupon brought this action in the County Court of the county of Lennox and Addington, to recover the said sum of \$100; and the defendant, still having the proceeds of the sale in his hands, thereupon applied to the Judge of the said County Court, in which this action was pending, who made an interpleader order, whereby the defendant was allowed to pay the sum of \$100 into Court, and an issue was directed to be tried between the plaintiff and W. R. Brock & Co., the execution creditors.

W. R. Brock & Co. then applied to a Judge in Chambers<sup>Statement.</sup> and obtained an order for prohibition to the Judge of the said County Court in respect of the interpleader order.

The defendant appealed from the order for prohibition, and his appeal was argued on the 27th November, 1891, before the Divisional Court (ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.).

*Aylesworth*, Q. C., for the defendant. The plaintiff sues for the money in the defendant's hands, affirming the sale. I concede that the defendant had no right, *quâ* sheriff, to interplead. The defendant's application was not made in his official capacity, but as a mere ordinary litigant, with the same rights as any other litigant. His application was under sub-section (a), not sub-section (b), of Rule 1141. \* He comes as a defendant in an action sued for money which is claimed by another claimant than the plaintiff in an adverse right, and he comes to the Court in which he is sued and asks relief by way of interpleader. The Judge of that Court had perfect jurisdiction over the action and to make the order he made.

*Hamilton Cassels*, for the execution creditors W. R. Brock & Co. The defendant made the application as sheriff. There is no evidence that Brock & Co. claimed this money. The sheriff assumed to sell without any instructions from them. The writ of summons was indorsed with a claim for damages. Brock & Co. have nothing to do with the defendant except as sheriff. He was simply an officer

\* Rule 1141. Relief by way of interpleader may be granted, (a) Where the person seeking relief (hereinafter called the applicant), is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (hereinafter called the claimants) making adverse claim thereto : (b) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods or chattels, lands or tenements, taken or intended to be taken in execution under any process, or under an attachment against an absconding debtor, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued.

Argument.

executing the process of the Court. The plaintiff is the execution debtor; an issue is never directed between the execution creditor and the execution debtor. On the proper construction of Rule 1141, sub-section (a) cannot apply to sheriffs. This claim must be judged by the formal claim put upon the record. The County Court had no jurisdiction. *W. R. Brock & Co.'s* execution was in the High Court, and by Rule 1156 the County Court has no jurisdiction.

I refer to *Lawrence v. Matthews*, 5 Dowl. 149; *Walters v. Nicholson*, 6 Dowl. 517; *Ingham v. Walker*, 31 Sol. J. 271; *Boswell v. Pettigrew*, 7 P. R. 393.

*C. J. Holman*, for the plaintiff. The action is for damages for wrongful seizure. It does not appear what the value of the goods claimed as exempt was. R. S. O. ch. 64, sec. 3, gives the judgment debtor the right to elect to receive the proceeds of the sale of the goods. Unless the plaintiff had so elected and the sheriff had accepted his election, the plaintiff could not recover for money had and received. The plaintiff would be entitled to \$100, even though the goods only brought \$50 at sale: *Glasspoole v. Young*, 9 B. & C. 696. No election was made. To entitle the defendant to interplead, he must be under debt for money, goods, or chattels.

*Aylesworth*, in reply. Rule 1156 applies only to an application by a sheriff for interpleader. Here the application is not by a sheriff, but by a defendant in an action. No want of jurisdiction is shewn.

February 1, 1892. The judgment of the Court was delivered by

ARMOUR, C. J.:—

We think that there is no doubt that the defendant, notwithstanding he was such sheriff and that the money in his hands was money made by him as sheriff under execution, was entitled to the benefit of Con. Rule 1141 (a), if

the facts appearing before the learned Judge satisfied him Judgment.  
that the case was brought within that Rule. Armour, C.J.

The learned Judge had jurisdiction in this suit, and this interpleader order was a proceeding in this suit: *Hamlyn v. Betteley*, 6 Q. B. D. 63; and whether the learned Judge came to a right or to a wrong conclusion is not for us to say.

If he came to a wrong conclusion he certainly cannot be prohibited in the face of *Re Long Point Co. v. Anderson*, 18 A. R. 401.

The appeal must, therefore, be allowed with costs here and in Chambers.

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## [CHANCERY DIVISION.]

## ZIMMER V. GRAND TRUNK RAILWAY COMPANY.

*Railway Companies—Grand Trunk Railway—Limitation—  
51 Vict. c. 29, (D.).*

Section 287 of 51 Vict. c. 29 (D.) "The Railway Act" by which the time for bringing an action for indemnity for any damages or injury sustained by reason of the railway is extended to one year, applies to the Grand Trunk Railway Company of Canada.

THIS was a demurrer to a portion of the statement of defence, which set up that this action, which was for negligence in respect to the disrepair of one of the defendants' bridges, and for the recovery of damages for injuries sustained by reason thereof, should have been brought within six months of the accrual of the cause of action.

The pleadings are sufficiently set out in the judgment.

The demurrer was argued before ROBERTSON, J., on February 10th, 1892.

## Argument.

*Rowe* for the plaintiff. 51 Vict. c. 29 (D.), s. 287, the new Railway Act, changes the time for bringing actions from six months to a year. The cause of action here, however, is not one within the limitation clause at all: *Reist v. Grand Trunk R. W. Co.*, 15 U. C. R. 355; *North Shore R. W. Co. v. McWillie*, 17 S. C. R. 511, see per Gwynne, J., at p. 513.

*Wallace Nesbitt* for the defendants. The Act 51 Vict. c. 29 (D.), is not intended to affect any special Act: *Western Counties R. W. Co. v. Windsor and Annapolis R. W. Co.*, 7 App. Cas., at pp. 188, 191, gives the canon of construction for these Railway Acts. The first Act is 14 & 15 Vict. c. 51. This is *The General Railway Clauses Consolidation Act*. See section 20. Then 16 Vict. c. 37 is the charter of the Grand Trunk Railway. By clause 2, section 20 of 14 & 15 Vict. c. 51 is incorporated into the charter, with certain modifications. C. S. C. (1859) c. 66, does not repeal but simply re-enacts *the Railway Clauses Consolidation Act*,

14 & 15 Vict. c. 51. There is no pretence for saying that the original Acts have been repealed, abolished or amended by any of the subsequent Acts; therefore the provisions of the original Act still apply to this railway as being incorporated in its charter. The Act complained of is one within the limitation clause: *Browne v. Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202, see p. 207; *Kelly v. Ottawa Street R. W. Co.*, 3 A. R. 616; *Hammersmith and City R. W. Co. v. Brand*, L. R. 4 H. L. 171. The cases referred to by the other side do not apply. The case of *Reist v. Grand Trunk R. W. Co.* was simply for not building a farm crossing, not for any damages done by the railway by reason of the omission to build the crossing. *North Shore R. W. Co. v. McWillie* is a mere *obiter dictum* of Gwynne, J., which is opposed to the case in the House of Lords of *Hammersmith and City R. W. Co. v. Brand*. See also *Roberts v. The Great Western R. W. Co.*, 13 U. C. R. 615; *Kelly v. Ottawa Street R. W. Co.*, 3 A. R. 616. The action here is not for a mere omission, but for damages occasioned by the alleged omission. The 51 Vict. c. 29 (D.), s. 287, is *ultra vires*, being an attempt to deal with property and civil rights, and therefore within the jurisdiction of the Provincial Legislature: *McArthur v. The Northern and Pacific Junction R. W. Co.*, 17 A. R. 86.

[The learned Judge declined to go into the question of *ultra vires*. As the Judges of the Court of Appeal in *McArthur and The Northern and Pacific Junction R. W. Co.*, 17 A. R. 86, were equally divided in opinion on the point, he would decide that the Act was *intra vires*.]

*Rowe* in reply. The Railway Act, 51 Vict. c. 29, is expressly made to apply to the Grand Trunk Railway. The Grand Trunk Railway itself from Montreal to Toronto was subject to the original Railway Consolidation Act, 14 & 15 Vict. c. 51; but this particular part of the road was originally the Preston and Berlin Road, which was purchased by the Grand Trunk Railway. If there were any special Act applicable to this particular road, there might be something in the argument of the defendants; but it

Argument.

**Argument.** has not been shewn that there was any such special Act. The road in question was governed by the general Act, and therefore the Act 51 Vict. c. 29 must apply. [*Nesbitt* referred to *River Weir Commissioners v. Adamson*, 2 App. Cas. 743.] The old Act of the Province of Canada was amendable,—it was not irrevocable, but was subject to amendment, and it has been amended by the General Railway Act.

*Nesbitt* referred to 51 Vict. c. 29, s. 2, sub-s. (t), which defines the meaning of "Special Act" used in s. 3. See also s. 2, sub-s. (q).

February 17th, 1892. ROBERTSON, J. :—

The action is brought by the plaintiffs, who are the children of Jacob Zimmer, late of the township of Waterloo, county of Waterloo, deceased, whose death was caused by reason of an accident which happened to him on February 10th, 1891, while attempting to pass over a bridge over the defendants' railway, running from the town of Berlin to the village of Doon and town of Galt, which line of railway was built about the year 1858, by the Preston and Berlin Railway Company, and which was afterwards purchased by the defendants under the authority of the statute 27 Vict. c. 56, and is and was on the said February 10th, 1891, operated and worked by the defendants as part of their line of railway.

The action is brought under the provisions of R.S.O. c. 135, c. 135, charging the defendants with having negligently allowed the bridge in question, which is part of the highway, and which was built by them over the said railway, to have fallen into decay and disrepair, by reason of which the deceased was precipitated off the bridge and fell a distance of twenty feet to the ground below, thereby causing his death.

The action was commenced on November 14th, 1891.

The defendants say, in the third paragraph of their statement of defence, that the said accident and the death of the said Jacob Zimmer happened after the passing of

the C. S. C. c. 66, known as "The Railway Act," and which Act is still in force and applies to these defendants; and that this action was not brought within six months next after the death of said Jacob Zimmer, and that the said cause of action is barred by s. 83 of the said Act. Judgment.  
Robertson, J.

The plaintiffs demur thereto, and say that by the Act of the Parliament of the Dominion of Canada, passed in the 51st year of Her present Majesty, c. 29, s. 287, the plaintiffs are not barred of their action by the lapse of six months from the time of the cause of action accruing, but have one year within which to commence their action, and that the said paragraph three is no answer, etc.

It is contended on behalf of the defendants that the Act 51 Vict. c. 29, s. 287, does not affect the defendants' charter: that sections 3 and 6 of the Act declare the application of it, and that in fact the 20th sec. of 14 & 15 Vict. c. 51, "The Railway Consolidated Clauses' Act," which limits the time to six months for bringing an action for any damage or injury sustained by reason of the railway, and which section was incorporated in the defendants' charter, 16 Vict. c. 37, has not been repealed, either expressly or by implication, notwithstanding the section 287 of cap. 29 of 51 Vict. And further, that such last mentioned section is *ultra vires* of the Dominion Parliament, as interfering, contrary to the British North America Act, with civil rights, which are within the sole jurisdiction of the several Provincial Legislatures.

As to the last mentioned contention, I intimated on the argument that as the defendants' railway had been declared to be a work for the general advantage of Canada, it had been brought within the jurisdiction of the Dominion Parliament, and was consequently subject to its legislation, and that the clause in the Railway Act, which limits the time for the bringing of actions for indemnity for any damage or injury sustained by reason of the railway, and which was made a part of the charter of the defendants' railway, and was adopted by it, is subject to be repealed, altered, amended or extended, to the same extent as any



Judgment. other clause of that Act, or the defendants' charter. But  
Robertson, J. apart from any opinion of my own, and without expressing any in positive terms, I am bound by *McArthur v. The Northern and Pacific Junction R. W. Co.*, 17 A. R. 86, which was an appeal from the decision of Mr. Justice Street, in which he decided that the Dominion statute then in force (R. S. C. c. 109, s. 27) was not *ultra vires*, with which decision the learned Chief Justice of Ontario and Mr. Justice Osler agreed, Mr. Justice Burton and Mr. Justice McLennan having dissented; for the purpose of this case, therefore, so far as I am at present concerned, that objection of the defendants is disposed of.

Then as to whether section 20 of "The Railway Clauses Consolidated Act," 14 & 15 Vict. c. 51, which by section 2 of 16 Vict. c. 37 (The Act to incorporate the Grand Trunk Railway Company), was incorporated therein, still remains in force.

The contention is that, even supposing for argument sake that the original "Railway Clauses Consolidation Act" has been repealed, the Grand Trunk Railway Act, 16 Vict. c. 37, not having been repealed, those clauses of the Railway Clauses' Act, which are incorporated in it, do not thereby become repealed. As a general rule I think this contention may be upheld, but in regard to this particular Act, I think there is provision made by 14 & 15 Vict. c. 51, s. 22, sub-s. 14, which shews that it was provided that no such contention should apply. That provision is in these words: "No amendment or alteration in this Act shall be held to be an infringement of the rights of any company authorized to construct a railway by any Act of this or any future session, with which this Act is or shall be incorporated." Now, this section is under the heading of "general provisions," and every railway charter granted after the passing of that Act (14 & 15 Vict. c. 51), had incorporated in it these provisions, and I think it manifest that Parliament thereby reserved to itself the right to amend or enlarge any of the clauses which by the special Act incorporated therein any of the clauses of the general Act.

Then by sec. 6 of cap. 24, 46 Vict. (1883), the Consolidated Railway Act amendments, the Grand Trunk Railway was declared to be a work for the general advantage of Canada. Judgment.  
Robertson, J.

This section is re-enacted by section 121, sub-section 2, of the Railway Act, R. S. C. c. 109; and again by sections 306 and 307 of 51 Vict. c. 29 (D). (1888), the Railway Act; and then by section 287 of the latter Act, the time for bringing actions or suits for indemnity for any damages or injury sustained by reason of the railway, is extended to one year next after the time when such supposed damage is sustained. Then the question is (this section, being antagonistic to the former), does it by implication repeal it?

The rule is that when the later of two general enactments is couched in negative terms, the inference is that the earlier one is repealed by the later, and even when the later statute is in the affirmative, it is often found to involve that negative which makes it fatal to the earlier enactment. As illustrative of this, I refer to *Read v. Storey*, 30 L. J. M. C. 110, 6 H. & N. 423; *Rix v. Borton*, 12 A. & E. 470; *Garnett v. Bradley*, 3 App. Cas. at p. 966, per Lord Blackburn, and the very late case of *Rockett v. Clippingdale* (1891), 2 Q. B. 293.

The conclusion I have come to on the whole case, therefore is, that section 287 of 51 Vict. c. 29 (D.), the Railway Act, 1888, by implication repeals section 83 of chapter 66 of the Consolidated Statutes of Canada, known as "The Railway Act," and that such section is not now in force; and I therefore give judgment for the plaintiffs on the demurrer, with costs.

A. H. F. L.

## [CHANCERY DIVISION.]

## RE CAMERON, MASON V. CAMERON.

*Life Insurance—Insurance for benefit of Wives and Children—Apportionment by will—R. S. O., 1887, c. 136—53 Vict. c. 39, s. 6.*

Before the coming into force of 53 Vict. c. 39, a testator insured his life in a Benefit Society, payable to his wife if she survived him, if not, to his children; and also subsequently insured his life in another similar society, payable to his wife and children. After the coming into force of the above Act, he made his will, bequeathing to his wife one-half of his life policies for her life and widowhood; and, after her decease, to his children in equal proportions:—

*Held*,—That R. S. O. (1887), c. 136, s. 6, the “Act to Secure to Wives and Children the Benefit of Life Insurance,” as amended by 51 Vict. c. 22, s. 3, and 53 Vict. c. 39, s. 6, applied; and that the wife was entitled to one-half of the sum payable under the policy first mentioned for life, and the other moiety, being untouched by the will, went to her absolutely; while as to the other insurance, she was entitled to one-half for life or widowhood by virtue of the will.

IN this action, which was one for the construction of the will of James Cameron, deceased, and for administration, certain questions arose regarding insurances made by the testator for the benefit of his wife and children.

The matter was argued on motion for judgment on February 10th, 1892, before ROBERTSON, J.

The circumstances of the case fully appear in the judgment.

**Argument.**

*W. R. Riddell*, for the plaintiffs, the executors of the will, asked for the direction of the Court.

*J. Hoskin*, Q. C., for the infant defendants. It has been decided that the terms of such policies can be altered by will, and by virtue of the will in this case, if properly interpreted, the widow takes only one-half of all the policy moneys for life: *Swift v. Provincial Provident Institution*, 17 A. R. 66; *Mingeaud v. Packer*, 21 O. R. 267; *Merchants' Bank v. Monteith*, 10 Pr. 588; *Campbell v. National Life Association Co.*, 34 U. C. R. 35; *Scott v. Scott*, 20 O. R. 313; *Re Lynn, Lynn v. Toronto General Trusts Co.*, 20 O. R. 475; R. S. O. ch. 136, secs. 5, 6; 51

Vict. (O.) ch. 22 ; R. S. O. ch. 172, sec. 11 ; 53 Vict. ch. 39, Argument. sec. 6 (O.).

*Bain*, Q. C., for the widow. There is nothing in any of the statutes authorizing the insured to change the trust by his will, but only to apportion the fund differently to what he has done before. He tries to cut down the gift below what had been given by the policies. The rights of the parties must be determined as at the time the contract was made, and the legislature cannot be deemed to have intended to interfere with them, unless they expressly say so. Again there is no express reference in the will here to any particular policy as there should be, if the testator intended to affect it. The testator does not apportion, he merely says he gives one-half ; but when an insured deals with it by will, he can only deal with the apportionment.

*Hoskin*, in reply. The testator could have taken the money altogether from the wife provided he gave it to the children, or from the children provided he gave it to the wife. Strangers could not be substituted to receive the benefit : *Scott v. Scott*, 20 O. R. 313.

February 17th, 1892. ROBERTSON. J. :—

The testator, on May 26th, 1885, received a contract of insurance, for \$2,450, from "The Canadian Mutual Aid Association," payable at his death, "to his wife Mary Jane Cameron, if she survives him, if not, to his children, within ninety days after due notice and proof of death," etc.

And on October 6th, 1887, the testator also received from "The Canadian Order of Foresters," a certificate, entitling him to all the rights and privileges of membership in the Order, "and further, the person or persons whose name or names are hereinafter written, are, within thirty days after satisfactory proof of the death of the said brother (the testator) entitled to the sum of \$1,000 from the Endowment Fund of the Order." Then the certificate, contains the following :—"This certificate is designated as



Judgment. payable to my wife and children, and must be presented  
Robertson, J. at the time of application for payment. Should any  
change in the name of the payee or payees be desired,  
notice of such change must be given to the High Secretary,  
and endorsed by him on the back of this certificate."

Afterwards, on August 12th, 1891, the testator duly made his last will and testament, and in and by it he *inter alia* bequeathed as follows:—"2. I give to my dear wife Mary Jane, one-half of all my personal property, including one-half of my life policies for her sole use and benefit, so long as she lives and remains my widow, but in case she marry again, I give her the sum of \$1,000 absolutely: the personal property mentioned in this paragraph shall mean personal property of which I am possessed at the date of these presents. 3. After the decease of my wife the personal property given to her for her use as long as she lives, and mentioned in paragraph two, shall be given to my then surviving children in the proportions mentioned in the next following paragraph of this my will."

This action is brought by the executors of the testator's will, against his widow, who is an executrix thereof, and his five infant children, and the plaintiffs claim:

1st. An interpretation of the said will.

2nd. A declaration as to the rights of all parties in the estate, etc.

3rd. Administration of the said estate, etc.

The widow contends as follows:—

*First*, as to the policy firstly above mentioned that the said policy is payable to her, and that she is absolutely entitled to the benefits conferred by the said policy, and to the sum of \$2,450, payable thereunder.

4. The said defendant further claims in respect of the said policy that her rights thereto and her absolute title to the insurance money payable thereunder are not in any way affected by the said last will and testament of her late husband, and the said defendant claims that under the said policy and rules and regulations of the said The Canadian Mutual Aid Association, and under the statutes and law governing life insurance by a husband in favour of his wife and children, she is entitled absolutely in her own right to the said insurance moneys, and that the said will does not operate as to cut down her interest in the said insurance policy and the moneys payable thereunder.

6. The said defendant alleged that under the said endowment certificate and the rules and regulations of the said Canadian Order of Foresters she is entitled absolutely in her own right to one-half of the said insurance, namely, \$500, and the said defendant contends that her rights under the said certificate are not affected by the said last will of her late husband, and are not in any way limited or cut down thereby, and the defendant submits that under the laws, rules, and regulations of the said Canadian Order of Foresters, and under the statute law and law governing the insurance of a husband for the benefit of his wife and children she is absolutely entitled to the interest in the certificate, as by the said certificate more effectually appears. And generally, as to paragraphs eight and nine of the said statement of claim the defendant claims to be absolutely and beneficially entitled to the full amount payable under the Canadian Mutual Aid Association policy, and to be absolutely and beneficially entitled to one-half the sum payable under the endowment certificate of the Canadian Order of Foresters, and as to the rest of the estate of her late husband, the said defendant says she has never made any claim other than that plainly given to her in the said will, and that no dispute as far as the said defendant is aware has arisen as to any matters in connection with the said estate excepting the claim raised by the plaintiffs as to the said insurance policy.

Judgment.  
Robertson, J.

8. The said defendant submits the proceedings herein are unnecessary and unwarranted; that upon the law governing the rights under the said insurance policy, which are the only matters about which there can be any difference, her rights are plain and that the plaintiffs should have conceded without litigation the defendant's right to the policy in the Canadian Mutual Aid Association as provided by the policy and to the payment over to the defendant of the endowment certificate in the Canadian Order of Foresters as therein provided.

The Act to secure to wives and children the benefits of life assurance (R. S. O. 1887, ch. 136), section 6, as amended by 51 Vict. ch. 22, sec. 3, and 53 Vict. ch. 39, sec. 6, enacts: (1) "The insured may by an instrument in writing attached to or endorsed on, or identifying the policy by its number or otherwise, vary a policy or declaration or an apportionment previously made, so as to restrict or extend, transfer or limit, the benefits of the policy to the wife alone, or the children, or to one or more of them, although the policy is expressed or declared to be for the benefit of the wife and children, or of the wife alone, or for the child or children alone, or for the benefit of the wife for life, and of the children after her death, or for the benefit of the wife, and in case of her death during the

Judgment. life of the insured, then for the child or children or any of them or although a prior declaration was so restricted ; and he may also apportion the insurance money among the persons intended to be benefited ; and may from time to time, by an instrument in writing attached to or endorsed on the policy or referring to the same, alter the apportionment as he deems proper ; he may also, by his will make or alter the apportionment of the insurance money ; and an apportionment made by his will shall prevail over any other made before the date of the will, except so far as such other apportionment has been acted on before notice of the apportionment by the will. (2) This section applies to policies heretofore issued, as well as to future policies.”

Robertson, J.

“The Canadian Mutual Aid Association,” and “The Canadian Order of Foresters,” were incorporated under the Benevolent Societies Act, R. S. O., 1877, ch. 167, and in *Swift v. The Provincial Provident Institution*, 17 A. R. 66, it was held that the Act to Secure to Wives and Children the Benefit of Life Insurance above referred to applies to insurance in societies incorporated under the last mentioned Act.

By section 5 of the above Act, R. S. O. ch. 136, it is declared that “such policy shall enure and be deemed in trust for the benefit of his wife for her separate use, and of his children or any of them, according to the intent so expressed or declared, and so long as any object of the trust remains the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy becomes payable,” etc.

In *Mingeaud v. Packer*, 21 O. R. 267, a person whose life was insured in a benefit society incorporated under the same statute as the societies in this case, on January 28th, 1888, his first wife being then dead, caused to be issued to him a certificate making the insurance money payable to his children. After this he married again, and on June 1st, 1889, at his request, a change was made, and a new certificate issued making the money payable to his second

wife. He died on November 19th, 1889. Held, *inter alia*, Judgment. that such certificate (*i. e.* the one made payable to the children) became a trust for the children, under section 5, and ceased, so long as the objects of the trust remained, to be under the control of the deceased, except only in accordance with sections 5 and 6 of R. S. O. ch. 136, which did not authorize him to revoke the certificate and replace it by the subsequent one in favour of his second wife. Robertson, J.

It will be observed that this certificate entirely ignored the children, and changed the object of the trust, in fact created a new object (the second wife) and for that reason, as I understand the case, it was held to be inoperative; but to that case, the amendments to sec. 6 made by 53 Vict. ch. 39, did not apply, but they do apply to the case now under consideration. Sec. 6 of the principal Act as amended by sec. 6 of 53 Vict. ch. 39, very materially extends the powers of the insured. He now has not only power to "extend," or "limit," but he has also the power to "transfer the benefits of the policy to the wife alone, or the children, or to one or more of them, although the policy is expressed, or declared to be for the benefit of the wife alone," etc. In my judgment, therefore, the testator was within his rights, the Act thus amended being in full force, when he made his will, and could by it vary the policies and make an apportionment of the moneys payable under them, among the wife and children, although the first policy was declared to be for the benefit of the wife alone, if she survived her husband; and, moreover, he could "limit" the benefit thus apportioned to the wife, to her for life, or during widowhood; or he could have "transferred" the whole to the children; but what the testator really did do, as regards the first policy, was to cut down one half of the amount to an estate for life, or during widowhood, leaving the other moiety undisturbed. So that in my judgment the wife is entitled to one-half of the sum payable under the policy first mentioned, for life, and the other moiety is untouched by the will and it therefore goes to her absolutely, she having survived her



Judgment. husband, it being declared, that only in case of her non-survival, the amount payable under it is to go to the children.  
Robertson, J.

This is not in terms of the contention of either party here. In fact the last amending Act (53 Vict. ch. 39, sec. 6) is that which makes the difference between this case and those cited, and so far as I am able to ascertain this is the first case which comes squarely within the terms of the sixth section of the principal Act as now amended, which has come before the Court for adjudication.

Then as to the certificate issued by the Foresters, it is made payable by its terms, to the wife and children—there are five of the latter. Mr. Bain admits now, that under it his client is only entitled to one-sixth part of the \$1,000, and not to one-half the amount as claimed in her pleading, so that the wife would be entitled to that one-sixth part, but he contends absolutely ; but under the will a different apportionment is made, extending her interest to one-half of the whole, but it “limits” that half to her for life, or during widowhood. She is therefore entitled to one-half of this sum for her life and widowhood only.

Having disposed of this question, then the widow contends that the proceedings here are unnecessary and unwarranted, etc., as set out by her in the eighth paragraph of her statement of defence.

According to my view of the law as it is at present, the contention of the widow is, to a certain extent, erroneous ; but it may be these plaintiffs have no right to raise the question with her. The several societies, whose policies or certificates are involved, might dispute her claims, but the plaintiffs who are executors, under the will, are not entitled to hold or receive her shares of the proceeds of these policies. I do not think the societies interested could be forced to pay over the several and respective amounts made payable to her by them, to these plaintiffs. The will does not purport to authorize the executors to receive these several sums, and they are not empowered to discharge the several societies on receiving the respec-

tive amounts from them. So far as the shares of the widow are concerned, she is entitled to receive them ; but as regards the portions payable to the infant children, no guardian has been appointed for them. The 12th section of the principal Act, R. S. O. ch. 136, provides : " If no trustee is named in the policy, or appointed as mentioned in section 11, to receive the shares to which infants are entitled, their shares may be paid to the executors of the last will and testament of the insured," etc. \* \* and such payment shall be a good discharge to the insurance company." Judgment.  
Robertson, J.

In the absence therefore of a guardian, I cannot say that these plaintiffs are not entitled to maintain this action ; and besides that, they ask to have the estate administered, which I think is desirable, in view of the fact that the bequests to the widow are for life or widowhood, and the assets should be realized, the estate fully administered, and after payment of all debts, etc., the residue should be invested for those concerned.

I think the costs of all parties up to this should be paid (those of the executors as between solicitor and client) out of the estate.

An order will go accordingly, and the reference will be to the Master at Cobourg to take the accounts, further directions and costs of the reference reserved.

A. H. F. L.

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## [CHANCERY DIVISION.]

## STEVENSON ET AL. V. DAVIS.

*Vendor and purchaser—Possession—Payment of interest until conveyance made—Delay in completion—Appropriation of money—Interest at reduced rate.*

In a contract for the sale of land, where possession is taken at once and the contract stipulates for the payment of interest, the purchaser must pay interest from the date thereof, unless (1) there be unreasonable delay in the completion attributable to the vendor; and (2) that there be an appropriation of the purchase money and notice thereof to the vendor.

In an action on such a contract, where the vendor was to prepare the conveyance, and the purchaser was to take possession at once and pay interest from the taking possession, and the purchaser, having taken possession, had his purchase money ready to pay over and deposited it in a bank,—at first to his own credit in his general account, but afterwards to the credit of a special account—of which he gave the vendor notice, and there was a delay of over two years in preparing the conveyance:—

*Held*, that the purchaser was bound to pay interest at the legal rate up to the time he deposited the purchase money to the credit of the special account, but thereafter only at such rate as he received from the bank. Judgment of ARMOUR, C.J., varied.

## Statement.

THIS was an appeal by the defendant from a judgment of ARMOUR, C. J., before whom the action was tried without a jury at Cayuga on 29th April, 1890, and in whose judgment the facts are set out.

*Furlong* and *G. C. Thomson* for the plaintiffs.

*Colter* and *Goodman* for the defendant.

October, 1890. ARMOUR, C. J.:—

The lands in the pleadings mentioned were granted by the Crown to Robert Vicars Griffith, on the 14th September, 1852.

Robert Vicars Griffith died in March, 1871, and by his will, duly executed, devised the said lands to his wife, Ellen Griffith, for life, remainder to his three daughters, Fanny Louisa Mencke, Mary Stevenson, and Rose Baxter, who were also his only heirs-at-law, and by the said will

appointed James Mitchell to be the executor, and the said Ellen Griffith to be executrix of his will, who duly proved the said will. Judgment.  
Armour, C.J.

Thereafter the said Ellen Griffith died, and in October, 1886, the said Fanny Louisa Mencke died, and by her last will devised her share of the said lands to her children, share and share alike, and thereby appointed John William Mencke, her husband, and Arthur Richard Low to be the executors of her said will, who duly proved the said will.

On the 28th February, 1887, the following agreement was entered into :—

CAYUGA, 25th February, 1887.

This memorandum witnesseth that Robert H. Davis Esq., sheriff, has agreed to purchase from the heirs of R. V. Griffith, deceased, the Griffith Homestead in North Cayuga immediately adjacent to the town of Cayuga, containing about sixty acres, being parts of lots 30, 31, and 32, in the first concession north of the Talbot road, for the price or sum of two thousand dollars. Possession to be taken at once by the purchasers, and the purchase money to be paid as soon as the conveyances are ready for delivery. Interest to be paid on the purchase money from date of possession. The purchaser to be allowed a fair value for straw and manure to be taken off the property by J. R. Martin, since last autumn, at a valuation satisfactory to both parties.

(Sd.) ROBERT H. DAVIS,

(Sd.) JAMES MITCHELL,

*Agent for R. V. Griffith's heirs.*

Immediately upon this agreement being entered into the defendant went into possession of the said lands, and the straw and manure were valued at \$25, and the title being perfect, all that remained to be done was the procuring the conveyances from Mrs. Stevenson and Mrs. Baxter, and from the executors of Mrs. Mencke with the approval of the official guardian, some of Mrs. Mencke's children



Judgment. being infants; and the payment of the purchase money :  
Armour, C.J. and I find that the conveyances were to be procured to be drawn and executed, and the official guardian's consent obtained by the plaintiffs; and I find that Mr. Snyder was acting as the plaintiffs' solicitor, and not as the defendant's, in procuring the conveyances to be drawn and executed, and in obtaining the consent of the official guardian.

The defendant immediately made preparations to be ready with the purchase money, as soon as the conveyances were ready for delivery, by disposing of some mortgages he held to the trustees of the Thompson estate, of whom Mr. Mitchell was one, and from whom he received a cheque signed by Mr. Mitchell and the other trustees for the proceeds.

I find that within one month after making the said agreement the defendant was prepared with the purchase money, and that he has ever since, till the month of May, 1889, had the purchase money in a bank ready to be paid over at once upon the conveyances being ready for delivery.

I find that the defendant frequently made inquiry if the conveyances were ready, and that within six months after the making of the agreement he informed Mr. Mitchell that the purchase money was lying idle in the bank, and that he would not pay interest on it.

I find that the purchase money was at that time at the defendant's credit in his general account, and that in January, 1888, he deposited it specially at interest in the bank, the interest then payable by the bank being three per cent.

I find that the plaintiffs, from the period of six months after the making of the agreement, were always aware that the defendant had the purchase money ready to pay over as soon as the conveyances were ready for delivery, and that he was insisting that he should not pay interest on such money by reason of the delay in the conveyances being got ready.

I find that it was not until after the 2nd of February,

1889, that conveyances were ready for delivery, or about two years after the making of the agreement, and I find that no explanation was given of the reason for so great delay, except that the consent of the official guardian had to be obtained. Judgment.  
Armour, C.J.

I find that there was inserted in the conveyances which were ready for delivery, this provision, "subject also to drainage as now existing, and right thereto, in the course in which such drainage now runs, by the heirs and assigns of John G. Stevenson, deceased, through and upon that part of the land hereby conveyed, or intended so to be, situate and being northerly of the land and residence of the heirs of the said John G. Stevenson, deceased, and between the said residence and the lands of Agnew P. Farrell, Esquire, with right also at all proper times to enter upon the said parcel of land, hereby conveyed, for the purpose only of opening ditching or repairing the said drain."

I find that defendant while not objecting to the heirs of John G. Stevenson having such right did object to his assigns having such right, and that thereupon Mr. Mitchell erased the words, "and assigns," in this provision, and that this erasure was made after the execution of the said conveyances.

I find that defendant thereupon offered to pay the amount of the purchase money, with such interest thereon from the date of making the agreement as could have been obtained from the bank, if the same had been deposited at interest in the bank during all that time; and Mr. Mitchell refusing to receive it and claiming interest at six per cent. from the date of the agreement, the defendant paid the amount so offered by him into the bank, to the credit of Mr. Mitchell.

This action was thereupon brought for the purchase money and interest at six per cent. from the date of the agreement, alleging a tender of proper conveyances; in answer to which it was set up that proper conveyances were not tendered, and to which it was counter-claimed

Judgment. that the defendant had suffered damages by reason of the Armour, C.J. conveyances not being ready for delivery according to the agreement.

Two questions were raised at the trial, the first being whether conveyances were ready for delivery, which the defendant was bound to accept, and the second being whether the defendant was entitled to be compensated for the damage it was alleged he had sustained by being obliged to keep the purchase money lying idle, or at a lower rate of interest than he was obliged to pay under the agreement, by reason of the delay of the plaintiffs not getting the conveyances ready for delivery.

I am of the opinion that conveyances were not ready for delivery to the defendant such as he was bound to accept, for he was not bound to accept conveyances containing such a provision as that above quoted; and the erasure of the words "and assigns" by Mr. Mitchell avoided the conveyance: *Henry Pigot's Case*, 11 Rep. 26 b; *Davidson v. Cooper*, 11 M. & W. 778, S. C. 13 M. & W. 343; *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *Suffell v. The Bank of England*, 9 Q. B. D. 555.

I am also of opinion that the defendant is entitled to recover, by counter-claim, any damages he sustained by being obliged to keep his purchase money ready without or at a lower rate of interest than he was obliged to pay under the agreement after the time when, by the agreement, the plaintiffs should have had the conveyances ready for delivery. There was no time stipulated or designated in the agreement within which the conveyances were to be ready for delivery, but the implication would be that they were to be ready within a reasonable time; and I find that they were not ready for delivery within a reasonable time, and that there was a breach therefore of the agreement on the plaintiffs' part; and if damages were thereby inflicted upon the defendant I am of the opinion that he is entitled to be compensated for such damages by the plaintiffs.

The allowance of such damages in no way alters the effect of the agreement between the parties, but upholds and

enforces it by giving compensation for the breach of it and Judgment. by putting the parties in the same position as if the agree- Armour, C. J. ment had been carried out, as it ought to have been.

It is in my opinion clear that an action at law would have lain, by a purchaser against his vendor, for damages for the breach by the vendor of an agreement such as this, where as in this case there were no difficulties as to the title, for not having the conveyances ready for delivery within a reasonable time. See *Farquhar v. Farley*, 7 Taunt. 592; *Sherry v. Oke*, 3 Dowl. 349; *Orme v. Broughton*, 10 Bing. 533; *Jaques v. Millar*, 6 Ch. D. 153; *Royal Bristol Permanent Building Society v. Bomash*, 35 Ch. D. 390; and that such damages would have included the loss occasioned to the purchaser by being obliged to keep the purchase money lying idle, or at a lower rate of interest than he was obliged to pay under his agreement: See *Sherry v. Oke*, 3 Dowl. 349.

If such damages were recoverable at law I do not see why they should not be the subject of compensation in equity, and I do not find anything in the decisions in equity against it.

In considering the various decisions in equity on this subject we must look in each particular case at the contract in that case; for the parties must be governed in their rights, by their contract; and when I say that I do not find anything in the decisions in equity against it, I mean of course decisions in equity upon contracts similar in effect to the one in this case.

There are a large number of cases in equity, such as *Sherwin v. Shakspear*, in 5 D.M. & G. 517; *Lord Palmerston v. Turner*, 33 Beav. 524; *Vickers v. Hand*, 26 Beav. 630; *Williams v. Ghenton*, L. R. 1 Ch. 200; *In re Monckton and Gilzean*, 27 Ch. D. 555; *Re Golds and Norton's Contract*, 52 L. T. R. N. S. 321, and *In re Riley to Streatfield*, 34 Ch. D. 386, where the contracts were, that the purchasers should pay interest after the time fixed for the completion of the contracts, notwithstanding delay from any cause whatever, and where it was held that the words



Judgment. "from any cause whatever" did not include the wilful default of the vendor, and that difficulties as to the title causing such delay did not constitute such wilful default. It is obvious that these cases which were decided upon contracts essentially different from the one in question, do not govern this case.

There are other cases in equity more similar to this in point of contract, such as *Howland v. Norris*, 1 Cox 59; *Powell v. Martyr*, 8 Ves. at p. 146; *Dickinson v. Heron*, cited in Sugden on Vendors and Purchasers, 14th ed., at p. 630, and *Kershaw v. Kershaw*, L. R. 9 Eq. 56, some of which would seem to favour the allowance of such damages by way of compensation.

I have carefully read the recent case *Re Dingman and Hall's Contract*, 17 A. R. 398, but nothing is said in that case which was necessary to its decision which is against my view in this.

In this case there was no difficulty as to the title, and there was a delay of nearly two years in getting the conveyances ready for delivery; this delay was, so far as appeared before me an unreasonable delay, and being such was a breach of the agreement for which the defendant is in my opinion entitled to damages.

I do not think it necessary for the purpose of entitling the defendant to damages, that under the contract in and the circumstances of this case, wilful default was necessary to be shown, and I do not think it necessary to find therefore whether there was or was not such wilful default.

Altogether, I think that the long delay, nothing excusing it being shown, raised such a strong inference of such wilful default as required an answer.

The measure of damages to which the defendant is, in my opinion entitled, is the excess of the annual interest upon the purchase money, which, by the agreement, he was bound to pay over the net annual rental of the lands in the condition they were in when he went into possession of them. He rented them for \$100 a year, but whether he or the tenant paid the taxes, I am not informed. I am not

informed either whether Mr. Mitchell has ever interfered with the money placed to his credit in the bank by the defendant, and whether it is there at interest. Judgment.  
Armour, C.J.

The best thing I can do to prevent further litigation, is to retain the case until the plaintiffs have ready for delivery proper conveyances, to be settled by the Master of this Court at Hamilton, in case the parties differ about them; and then upon being informed that this has been done, and receiving the information to which I have adverted, I will finally dispose of the case.

I am not to be understood as having determined that the defendant is entitled to recover in this case any particular amount of damages, or that he has sustained any damages at all, for I have not before me the information I require; nor have I taken into account any profits made by defendant upon the purchase money; and I retain the determination of this question until I shall have received the required information already adverted to, when I will finally dispose of the case.

August 18th, 1891.

It being now shown to me that the tenant of the land in question pays the taxes assessed against the said land, and that the defendant deposited the purchase money in a bank to his own credit on the 13th January, 1888, and kept it so deposited till the 1st day of May, 1889, receiving therefrom, as interest, the sum of \$87.19, and that on the 2nd day of May, 1889, he deposited to Mr. Mitchell's credit in a bank the sum of \$1,975 and \$87.19, and on the 16th day of May, 1889, the further sum of \$66 which deposits so made Mr. Mitchell refused to accept. I am of the opinion that the defendant has not sustained any damages by reason of the breach by the plaintiffs of their agreement to convey the said land to him within a reasonable time, which he is entitled to have deducted from the purchase money and interest payable by him under the said agreement, but that he is bound to pay to the plaintiffs the

Judgment. whole amount of the purchase money and interest according to the terms of the said agreement.  
 Armour, C. J.

The rent receivable by the defendant up to the 10th April, 1891, from the date of the agreement, say for four years and forty-four days, was \$412, and the interest payable by him for the same period was \$488.28, or an excess of interest payable over rent receivable of \$76.28; and this amount the defendant would have been entitled to by way of damages, and to have deducted from the purchase money and interest payable by him, had he kept the purchase money lying idle, ready to be paid over at any time, but he did not do so, but deposited it at interest receiving for it a larger sum than \$76.28, namely \$87.19, which must go against the said sum of \$76.28.

The claim made for damages caused to the defendant by having to sell mortgages drawing interest in order to have the purchase money ready, cannot be entertained.

The amount payable by the defendant to the plaintiffs will, therefore, be made up as follows:

Amount due up to April 10, '91.

For principal.....	\$1,975.00
“ interest.....	488.28
	<hr/>
	\$2,463.28

Deduct amount at Mr. Mitchell's credit on 10th April, 1891, deposited to his credit by defendant .....

Balance .....

Add interest on balance till day of payment thereof.

On payment as above the defendant will be entitled to the conveyances, or if he prefers it there will be a vesting order to be obtained at his expense.

Technically the plaintiffs must have failed upon their statement of claim owing to the defect of the conveyance from Mrs. Stevenson; but their statement might have been amended and the suit changed to one for specific performance and a vesting order made. Substantially the defen-

dant has failed but his contention was not without merit. Judgment.  
 On the whole, I think that I will pursue the fairest course Armour, C.J.  
 by giving no costs to either party.

From this judgment the defendant appealed to the Divisional Court, and the appeal was argued on December 9th, 1891, before BOYD, C., and MEREDITH, J.

*Furlong* and *Geo. C. Thomson* for the appeal. The findings of the preliminary judgment have not been appealed from. There was an unusual delay of over two years not attributable to the defendant and the excuse that the consent of the official guardian on behalf of the infants was wanting has been held by the trial Judge not to be sufficient. The defendant did all he could and kept his purchase money ready at a lower rate of interest. All the parties knew this. The money was appropriated by defendant to meet the purchase money, and the plaintiffs were notified that it was lying idle. He also offered the total purchase money and interest for *all* the time until it was paid in to Mitchell's credit, at the rate the bank allowed, although he did not even get that much himself at first. The deed offered has been found by the trial Judge to be invalid. The interest should cease as soon as the money was appropriated and paid into the bank. The test is, is the money lying unemployed and useless to the defendant, and have the plaintiffs had notice thereof? If the money is set apart and no interest received, none should be allowed. If we gave notice that the money was in an attorney's hands we would not be liable for interest: *Powell v. Martyr*, 8 Ves. at p. 146. I also refer to *Kershaw v. Kershaw*, L. R. 9 Eq. 56; *Howland v. Norris*, 1 Cox 59; *The Regent's Canal Co. v. Ware*, 23 Beav. 575; *In re Monckton and Gilzean*, 27 Ch. D. 555; *In re Riley to Streatfield*, 34 Ch. D. 386; *In re Young and Harston's Contract*, 31 Ch. D. 168; *Lewis v. The South Wales R. W. Co.*, 10 Ha. 113; *Robertson v. Skelton*, 12 Beav. 363; *Re Golds and Norton's Contract*, 52 L. T. R., N. S. 321; *Denning v. Henderson*, 1 D.



Argument. & S. 689; *Dyson v. Hornby*, 4 D. & S. 481; *Winter v. Blades*, 2 S. & S. 393; *DeVisme v. DeVisme*, 1 Mac. & G. 336; *Royal Bristol Permanent Building Society v. Bomash*, 35 Ch. D. 390; *Phelps v. Prothero*, 7 D. M. & G. 722; *Orme v. Broughton*, 10 Bing. 533; *Williams v. Glenton*, L. R. 1 Ch. 200.

*C. W. Colter*, contra. The evidence shows the delay was unavoidable and that the defendant knew there would be delay, and that the deed was accepted as satisfactory by him with the alteration. There must be a wilful delay. Here the delay was caused by the solicitor and the official guardian and the plaintiffs were not to blame. In *Kershaw v. Kershaw*, L. R. 9 Eq. 56, the specific money was set apart and appropriated to the specific purpose. The defendant should have had the deeds prepared and tendered for execution.

*Furlong* in reply referred to *Elliot v. Turner*, 13 Sim. 477.

December 23rd, 1891. BOYD, C.:—

The contract in this case provides that possession is to be taken at once by the purchaser, and the purchase money was to be paid as soon as the conveyances were ready for delivery. Interest was to be paid on the purchase money from the date of possession.

There being thus a contract to pay interest, the purchaser, according to the course of this Court, cannot be exempt from interest unless two things happen: (1), that there be unreasonable delay in completion attributable to the vendor: (2), that there be in view of this delay an appropriation of the purchase money by the buyer, and notice to the seller that the money is so placed.

The rule was so laid down as to such a contract as the present by Romilly, M. R., by way of *dictum* in *Herbert v. Salisbury, etc. R. W. Co.*, L. R. 2 Eq., at p. 225, and was afterwards expressly decided by him in *Kershaw v. Kershaw*, L. R. 9 Eq. 56, a case on all fours with this, both as

to the frame of the contract, the delay of the vendor, the possession of the purchaser, and the appropriation of the price.

Judgment.  
Boyd, C.

I rely upon the finding of facts by the Chief Justice who tried the case, as set forth in his preliminary judgment which has not been appealed from. The purchaser went into possession and sold out securities at a higher rate of interest than the statutory, that he might be in funds to pay the price. This money he deposited at his bankers, at first to his general, and afterwards, in January, 1888, to a special account, where it has always been; at first lying idle and unproductive, but since January, 1888, bearing three per cent. interest.

Of this appropriation of money he forthwith gave notice to the vendors, and complained frequently of the delay in procuring the conveyance, and informed them that he should object to paying more interest than he received.

The trial judge finds that six months was a reasonable time to allow the vendors to complete the transaction by conveyance—which he finds it was for them to procure. The contract and possession was in February, 1887, and no valid conveyance has yet been delivered. There was an attempt in October, 1888, to close, but the deed then tendered was avoided by the vendors' agent striking out words objected to by the defendant, after it had been executed. Since then the matter has remained open, and it is found that this action was brought by the vendors before they had a right to the purchase money, because of the non-delivery of a valid and proper conveyance.

The vendors have not excused themselves for the unreasonable delay which has arisen after the six months from the date of the contract. It was for them to prove that it was unavoidable, or at least not wilful on their part. It appears that the title was perfectly good, and the only suggestion of the cause of delay, was that the consent of the official guardian had to be obtained, as to the conveyances of a minor's interest.

Now the vendors knew that the money was lying

Judgment.

Boyd, C.

idle or at small interest, and it is not for them to put the burden of their (presumably) avoidable default upon this defendant who was ready to close. The reason of the authorities is, that notwithstanding the general contract to pay interest, the purchaser has the means of protecting himself from the unreasonable and injurious delay of the vendors by making appropriation of the price, giving notice thereof to the vendors, that there may be equality (*Powell v. Martyr*, 8 Ves. 146); and then being liable for only such interest as the segregated fund has produced.

In *Kershaw v. Kershaw*, L.R. 9 Eq. 56, Lord Romilly said, that the interest was stopped because of the purchaser having paid the money to a separate account, and having notified the other party, whereupon it became the duty of the vendors, if they wished for interest, to call upon the purchaser to invest for their benefit.

There was certainly a sufficient appropriation by the defendant when he deposited to a separate account. The vendors were, on the findings, all along aware that the money had been provided, and was lying ready in the bank. According to *Winter v. Blades*, 2 S. & S. 393, there was enough done when the money was paid into and retained in the bank to answer the price, though not put into a separate account; but this decision, though never overruled, has not been followed.

The most careful analysis of cases on this very complicated question of interest on purchase money, that I have seen, is to be found in Webster's Conditions of Sale, pp. 279-293.

The judgment should be for interest at six per cent. for the first six months. I would also make it six per cent. for the perhaps doubtful period up to January, 1888, but from that time the interest should be what the bank paid.

The plaintiffs are in the wrong by suing before they tendered a proper deed, and the defendant, though failing in part, is mainly right, and I think he should have his costs. The judgment below should be vacated and entered in this form.

MEREDITH, J. :—

Judgment.

Meredith, J.

The plaintiffs' contention, that it was the defendant's duty to prepare the conveyance and tender it for execution, made now, for the first time, comes, in view of their conduct and their pleadings, and the findings of the trial Judge not moved against, quite too late. Whatever may be the general rule between vendor and purchaser, these plaintiffs must now be held to have been bound to prepare the conveyance and be ready to deliver it duly executed, before being entitled to the purchase money.

And the action, having been brought merely to recover the purchase money and interest, the plaintiffs alleging a tender of the conveyance duly executed, but the trial Judge having found—and that finding has not been moved against—that the deed tendered was not a valid one, but void by reason of an alteration made in it after execution, might well be dismissed without more; and that would, it seems to me, be the proper way to deal with it.

But as the question of interest has been dealt with so fully by the trial Judge, and upon the argument here, I am willing to express my opinion upon it in the hope of saving further litigation and costs in a matter involving so little so far as the parties are substantially concerned; a matter in which, I venture to say, all, or nearly all, litigation and costs might and should have been avoided.

The agreement seems to me to mean that the vendor shall make title within a reasonable time, and that until that time the purchaser shall pay interest upon the purchase money.

The trial Judge has found that six months was a reasonable time. That finding is not complained of, and is one with which the vendor, at all events, could not reasonably find fault.

I see nothing in the agreement indicating an intention that the contract as to interest should continue *post diem solutionis*.

I am quite unable to perceive why a person agreeing to



Judgment.  
Meredith, J. pay interest as here, from "date of possession," which was to be taken "at once," should stand in the same position as one who agrees to pay interest until the title is made, the property conveyed, and the purchase money paid, "notwithstanding delay from any cause whatever." It would doubtless surprise the parties to the agreement to be told that that was the legal effect of their simple agreement.

In the latter case it may, perhaps, well be that in the absence of delay through the wrong of the vendor the purchaser could not be relieved; but how can that fairly be in the former case: is no effect to be given to the vendor's implied agreement to make title and convey in six months: is the purchaser to suffer for the vendor's default without having expressly and clearly so agreed? Was it wrong for the defendant to have realised upon his securities in order to be ready to carry out his part of the contract, or to expect the vendor to carry it out on his part too?

The agreement in question put the parties, in my judgment, just as this Court would have put them in the absence of it. And the defendant would have been at the expiration of the six months entitled to sue for specific performance.

Where a purchaser has not by his own agreement precluded himself from so doing, as for instance, perhaps in the case mentioned, where he has agreed to pay interest during all delays, the well established rule is, that when the time for payment comes he may tender his purchase money, and, if the vendor is not ready and willing to complete the contract, may appropriate it, with due notice to the vendor, as was done here, and thereby relieve himself from payment of interest after that time; the vendor having the right to require the investment of the money pending the completion.

There was, in my opinion, no sufficient appropriation of the purchase money in question until 13th January, 1888; and therefore the defendant should pay interest from the 25th February, 1887, the date of taking possession, after

the rate of six per centum per annum, until the 13th <sup>Judgment.</sup> January, 1888; and from that day until the contract is <sup>Meredith, J.</sup> completed, such interest only as the money has earned.

The simplest way of disposing of the matter finally is to allow the parties to amend so that specific performance of the agreement be claimed; to add the necessary legal personal representatives as plaintiffs, upon their written consent: Con. Rule 324, (b); to direct payment by the defendant of the purchase money, with interest as before stated, less his costs of the action, including of course this motion, to be taxed; and thereupon to vest the lands in question in the defendant for all the estate, right, title and interest of the plaintiffs and of each of them therein and thereto, if the parties, including those to be added, consent; otherwise I would allow the motion, and dismiss the action with costs.

I may add that I have been unable to find anything in *Re Dingman and Hall's Contract*, 17 A. R. 398, certainly nothing necessary for the determination of that appeal, inconsistent with this disposition of this action; nor in *Re Riley to Streatfield*, 34 Ch. D. 386; whilst *Kershaw v. Kershaw*, L. R. 9 Eq. 56, seems quite in point in favour of it, though perhaps not quite as strong a case for the purchaser as this. In *Re Riley to Streatfield*, it is said of *Kershaw v. Kershaw*, that it was a totally different case, for though there was the provision for payment of interest until the time of payment of the principal in both, there was in the one and not in the other the provision for payment of it "in case of default from any cause"; that which, if nothing more, is wanting in this case, as in *Kershaw v. Kershaw*, to sustain the claim for interest at the higher rate all through.

G. A. B.

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## [COMMON PLEAS DIVISION.]

ROGERS ET AL., EXECUTORS OF JOSEPH ROGERS, DECEASED,  
v. A. R. CARMICHAEL, EXECUTOR OF WILL OF CHARLES  
KOON ROGERS, DECEASED, ET AL.

*Will—Construction of—Children—Grandchildren—Issue—Legacy—Period  
of vesting.*

A testator devised and bequeathed his real and personal estate to his wife for life, or until remarriage, with powers of disposal; and by a residuary clause devised the residue not specifically devised or bequeathed and not sold or disposed of by his said wife—immediately after her death or remarriage, to his executors to sell and convert same into money and out of the proceeds pay a specific sum to each of his five sons and to divide the balance share and share alike between his three daughters, and if his said daughters should die before him or before said distribution leaving issue the share or shares of his said daughters so dying should be divided ratably and proportionately amongst the child or children of said daughter or daughters living at the time of said distribution, so that the issue of any of his said daughters who might be dead should receive her or their parents' share. The widow survived the testator and died without having remarried. A son, C. K. R., and a daughter, M., also survived the testator, but died prior to the widow, the son leaving no issue, and the daughter a son F. and a daughter M. C., the said last named daughter having also died leaving two children:—

*Held*, that the word *children* here must be taken in its primary sense, *i.e.*, the immediate children of the testator, and excluded grandchildren, so that F. took the whole of his mother's share to the exclusion of the children of the daughter M. C.; and that the legacy to C. K. R. became vested on testator's death, payable on the widow's death, and that his personal representatives were entitled thereto.

## Statement.

THIS was an action for the construction of a will, which was argued before MACMAHON, J., on 5th February, 1892.

*W. N. Miller*, Q. C., for the plaintiffs.

*John Hoskin*, Q. C., for the infant defendants.

*D. E. Thomson*, Q. C., *J. W. Bowlby*, Q. C., and *J. W. Williams*, for the other defendants.

February 17th, 1892. MACMAHON, J.:—

The plaintiffs ask the opinion of the Court as to the construction of certain devises and bequests contained in the will of the testator, Joseph Rogers, which bears date the 26th day of January, 1867.

The testator devised and bequeathed all his real and

personal estate to his wife Jeannet Nixon Rogers, for life, or until she should marry, with a power to her to dispose of such parts of the estate as she might deem necessary for the support of herself and such of the testator's children as should live with her.

udgment.  
MacMahon,  
J.

The clause in the will dealing with the residue of the testator's estate is the one creating the difficulty amongst the devisees, and which the executors desire should be construed, and is as follows :—

“ Lastly, as to the residue of my estate and effects, real and personal, not above specifically devised or bequeathed, and not sold or disposed of by my said wife under the powers above conferred upon her, I give, devise, and bequeath the same from and immediately after the death or remarriage of my said wife, which shall first happen, to \* \* my executors hereinafter named upon and subject to the trusts following, namely, to sell and convert the same and every part thereof into money, and out of the proceeds thereof to pay \* \* to my sons, John and Halbert Rogers, Charles Koon Rogers, James Harris Rogers, and Alexander Rogers, the sum of \$500 each \* \* And lastly, to divide the balance share and share alike between my daughters Mary Margaret Bayley, widow of Henry Bayley, deceased, late an officer in Her Majesty's commissariat, Clarissa Jane George, wife of James George, Susan Ewart, wife of George Ewart, of Toronto, gentleman, and Marian Christina Bowlby, wife of John Wedgewood Bowlby. And I further direct that if any of my said daughters die before my decease, or before said distribution, leaving issue, then the share or shares of my said daughters so dying shall be divided ratably and proportionately amongst the child or children of said daughter or daughters who may be living at the time of the said distribution, so that the issue of any of my said daughters who may be dead shall receive her or their parents' share.”

Joseph Rogers, the testator, died on the 13th of September, 1873.



Judgment.  
MacMahon,  
J.

Jeannet Nixon Rogers, the widow of the testator, died on the 1st day of July, 1891, without having remarried.

Charles Koon Rogers survived the testator Joseph Rogers, and died, without leaving issue, in the month of November, 1879, prior to the death of Jeannet Nixon Rogers.

Mary Margaret Bayley, the daughter of Joseph Rogers, the testator, named in his will, died on the 28th of July, 1882, after the death of the testator and before the death of her mother, the said Jeannet Nixon Rogers.

The said Mary Margaret Bayley left two children, namely, the defendants Frederick Bayley and Mary Christina Bayley, who married John Bruce in February, 1873, and who died on the 12th of May, 1876, leaving two children her surviving, the defendants Henry A. B. Bruce, now an infant of the age of seventeen years, and Roberta Mary B. Bruce, an infant of the age of sixteen years.

The estate of said Joseph Rogers not disposed of at the death of said Jeannet Nixon Rogers, consisted of a house and lot worth \$1,500, certain leasehold property in Toronto, worth \$13,500, and bank stock worth \$3,000, in addition to certain real property specifically devised.

The defendant, Marian Christina Bowlby, is one of those interested in the residuary estate of the testator, Joseph Rogers, and claims that the bequest of Charles Koon Rogers has lapsed, and forms part of such residuary estate.

The executors of Charles Koon Rogers claim such legacy insisting that the bequest was a present bequest which vested in him on the death of the testator, and became payable at the death of Jeannet Nixon Rogers.

The infant defendants, children of Mary Christina Bruce, claim they are entitled to one-half of the share in the residuary estate left by the testator to his daughter Mary Margaret Bayley; and Frederick Bayley claims the whole of such share.

As already stated, the clause for the disposition of the residue of the testator's estate provides "as to the residue of my estate, real and personal \* \* and not sold or

disposed of by my said wife under the powers above conferred upon her, I give, devise, and bequeath the same from and immediately after the death or remarriage of my said wife which shall first happen," etc. So that the period of distribution—the widow not having married—was at her death.

Judgment.  
MacMahon,  
J.

Then as to the share bequeathed to Mary Margaret Bayley. She died prior to the period of distribution, viz., in the year 1882, leaving her surviving one child, the defendant Frederick Bayley, her other child, Mary Christina Bruce (the wife of John Bruce), having predeceased her mother.

The testator provided that if any of his daughters should die before the period of distribution "leaving issue," then the share of such daughter or daughters should be divided ratably and proportionately amongst the child or children of said daughter or daughters who may be living at the time of said distribution, so that the issue of any of his said daughters, who might be dead, should receive her or their parents' share.

It was urged for the infant defendants—the children of Mrs. Bruce and grandchildren of Mary Margaret Bayley—that "issue" does not mean, nor is it confined to the children of the devisee, Mary Margaret Bayley, but extends to and includes her grandchildren.

In *Re Hopkins' Trusts*, 9 Ch. D. 131, 136, a testator by his will gave a fund to trustees "in trust for the lawful issue of F. H. surviving him, equally to be divided between them if more than one \* \* and if but one then for such only child," with a gift over, in default of issue of F. H. becoming entitled.

The issue of F. H. who survived him, were a son, a daughter, four children of the son, and six children of a deceased daughter. It was held that by the use of the word "child," the testator had himself interpreted the word "issue," and that the word "issue," must be restricted to children, and the fund go in moieties between the surviving son and the daughter.

Judgment.

MacMahon,  
J.

In *Bowen v. Lewis*, 9 App. Cas. 890, at p. 915, Lord Blackburn said: "Lastly, the words 'child or children' primarily mean issue in the first generation only, sons and daughters, to the exclusion of grandchildren, or other remoter descendents. Here also, if there is enough to justify the construction, the words may be read as equivalent to issue or heirs of the body; but it requires something to justify the reading the words in what is not their primary sense."

In the case in hand, there is not only wanting that which would justify the words "child or children," used by the testator in his will, as being read in any other way than in their primary sense, but the testator has further interpreted the word "issue," by confining it, so that such issue "shall receive *her or their parents' share*," *i. e.*, the parents' share shall, if there be only one child, go to him or her, and if more than one, shall be divided ratably and proportionately amongst all her children.

As said by the Master of the Rolls, in *Ross v. Ross*, 20 Beav. (cited by Mr. Hoskin) 645, at p. 649: "When the word 'issue' is used in reference to the 'parent' of that issue, it must mean 'his children;' that is, the word 'parent,' confines the word 'issue' to the 'children' of the taker."

It is, I consider, beyond question, that Frederick Bayley, as being the only surviving child of Mary Margaret Bayley at the period of distribution under the will, takes his mother's share to the exclusion of the children of his sister, Mary Christina Bruce, viz., Henry A. B. Bruce and Roberta M. B. Bruce.

Then the other question under the will is whether the legacy in favour of Charles Koon Rogers became vested on the death of the testator, or was contingent on the legatee surviving the period of distribution.

The general rule as to legacies bequeathed in terms similar to those in which the testator bequeathed the particular legacy in question to his son Charles Koon Rogers, is thus stated in Jarman on Wills (4th ed.), 840-1; "Even though there be no other gift than in the direction to pay

or distribute *in futuro*; yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will *not* be deferred until the period in question. Thus, where a sum of stock is bequeathed to A. for life; and, after his decease, to trustees, upon trust to sell and pay and divide the proceeds to and between C. and D., or to pay certain legacies thereout to C. and D.; as the payment or distribution is evidently deferred until the decease of A., for the purpose of giving precedence to his life-interest, the ulterior legatees take a vested interest at the decease of the testator. This doctrine prevails as well in gifts to a class as to individuals."

Judgment.  
MacMahon,  
J.

A number of cases are cited in support of the language of the text.

In *Packham v. Gregory*, 4 Hare 399, Sir James Wigram, V. C., said at p. 398: "If upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the Court has commonly expressed it, for the benefit of the estate \* \* the interest is vested notwithstanding, although the enjoyment is postponed." And in *Leeming v. Sherratt*, 2 Ha. 14, the same learned Judge, at p. 17, said that the Courts of Equity in the construction of wills relating to personal estate, followed the civil law, and "by that law when a legacy is given absolutely, and the payment is postponed until a definite future period, the Court considers the time as annexed to the payment, and not to the gift of the legacy, and treats the legacy as a *debitum in presenti, solvendum in futuro*." And at p. 19, the following extract is made by the learned Vice-Chancellor from the judgment of the Master of the Rolls in *Mory v. Wood*, 3 Bro. C. C. 473: "All the cases establish this principle, that where the time is mentioned, as referring to the legacy itself, unless it appears to have been fixed by the testator as absolutely necessary to have arrived before any part of his bounty can attach to the legatee, the legacy attaches immediately, and the time of payment is postponed, not being annexed to the substance of the gift," etc.



Judgment.

MacMahon,  
J.

In this case precedence was given to the life interest of the testator's widow, Jeannet Nixon Rogers, and "the ulterior legatees," including Charles Koon Rogers, took a vested interest at the testator's decease, payable on the death of the testator's widow.

The representatives of the late Charles Koon Rogers are entitled to the legacy bequeathed to him.

The costs of all the parties should be paid out of the estate.

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## [COMMON PLEAS DIVISION.]

M'GILL V. THE LICENSE COMMISSIONERS OF THE CITY  
OF BRANTFORD.

*Intoxicating Liquors—License Commissioners—Power to pass resolutions fixing hours for sale of liquor—R. S. O. ch. 194, secs. 4, 32, 54—Notice of motion—Power to quash.*

License commissioners, appointed under R. S. O. ch. 194, on 17th April, passed a resolution providing that, after 1st May following, in all places where intoxicating liquors are or may be sold by wholesale or retail, etc., no such sale or disposal of the same shall take place therein, etc., between midnight and 5 a.m. which was subsequently amended by substituting 11 p.m. for midnight :—

*Held*, that under section 4 enabling the license commissioners to pass resolutions for regulating taverns and shops, there was power to pass the resolutions here; and that such power was not interfered with by sections 32 and 54, no by-laws on the subject having been passed by the municipal council.

*Quære*, whether there is power on notice of motion to quash resolutions of this kind.

*Daniels v. Municipal Council of Burford*, 10 U. C. R. 478; *Cæsar v. Municipality of Cartwright*, 12 U. C. R. 341, commented on.

THIS was a motion made on notice to quash, on several Statement.  
grounds, certain resolutions and an amendment thereto, made by the Board of License Commissioners of the city of Brantford, appointed under "The Liquor License Act," R. S. O. ch. 194, sec. 3.

The resolutions were as follows :—

"Resolutions passed by the Board of License Commissioners for the city of Brantford, on the 17th day of April, 1889, under and by virtue of chapter 194 R. S. O. of the Liquor License Act—to take effect on and after the 1st May, 1889 :

That in all places where intoxicating liquors are or may be sold by wholesale or retail in the city of Brantford, no such sale or disposal of the same shall take place therein, or on the premises thereof, or out of, or from the same, to any person or persons whomsoever, from and after the hour of twelve o'clock at night of any day, until five o'clock in the morning thereafter. Nor during any further time on any day or days during which, by any statute in force in this Province, or by any by-law in force in the municipality of the city of Brantford, the same is prohibited; and the bar or bar-rooms thereof shall at such times be kept closed, save and except in case where a requisition for medical purposes, signed by a licensed practitioner or by a justice of the peace, is produced by the vendee or his agent; nor shall any such liquor, whether sold or not, be per-

Statement.      mitted or allowed to be drank in any such places during the time prohibited above mentioned, except by the occupant or some member of his family, or lodger in the house.

That all and every person or persons whomsoever, who shall disregard, contravene, or in any manner violate the above rules and regulations, and shall be convicted thereof before the police magistrate of the city of Brantford, shall be liable to a penalty not exceeding twenty dollars nor less than five dollars for each offence, in the discretion of the said police magistrate, together with the costs and charges attending the proceedings and conviction; and in default of payment thereof such penalty to be levied by distress and sale of the goods and chattels of the offender; and in case no sufficient distress is found to satisfy the said conviction, it shall be lawful for the said police magistrate to order that the person or persons so convicted be imprisoned in the common jail of the county of Brant for a period not exceeding thirty days, and to be kept at hard labour in the discretion of the said police magistrate."

On the 30th of April, 1891, the above resolutions were amended, as follows:—

"That the Rules and Regulations, passed on April 17, 1889, be amended from twelve o'clock at night, the hour for license holders to close, to eleven o'clock at night; and said rules and regulations remain in full force in all other respects.

*Du Vernet* supported the motion.

*Wilkes*, Q. C., contra.

January 27th, 1892. ROSE, J.:—

This was a motion to quash a resolution of the Board of License Commissioners of the city of Brantford, of date the 30th April, 1889. The amendment prohibited the sale of liquor on licensed premises from the hour of eleven o'clock at night until five next morning.

There were many grounds of objection urged, but one only remains to be considered, as Mr. Wilkes was content to abandon all of the resolution save the clause to which I have referred, and a clause providing that any one violating the rule should be liable to a penalty on conviction as therein provided.

Mr. DuVernet urged that the Board had no power to pass any resolution on the subject, as such power was vested in the council alone.

Judgment.

Rose, J.

I do not think that this is so. I am not troubled in arriving at the conclusion which I am about to state in considering *Re Arkell and Corporation of St. Thomas* 38 U. C. R. 594, or *Re Brodie and Corporation of Bowmanville*, 38 U. C. R. 580. I am rather inclined to think that the learned Chief Justice of this Province, then in the Queen's Bench, somewhat doubted the correctness of the decision in *Re Brodie and Corporation of Bowmanville* from the observations made by him in *Re Arkell and Corporation of St. Thomas*. But the grounds upon which I put my decision save me from the necessity of analyzing or considering the cases referred to.

It is clear that in terms by section 4 of R. S. O. ch. 194, the power was conferred upon the commissioners to pass resolutions "for regulating all taverns and shops to be licensed," and it was not argued that this in fact was not broad enough to cover a resolution fixing the hours during which sales might be made.

There is no doubt but that by section 32 power is conferred upon the municipal council to pass a by-law imposing any restrictions upon the mode of carrying on the traffic of liquor under shop licenses as the council may think fit, but such by-law must be passed before the 1st of April, and may be made to come into force on the 1st of May next ensuing, or on the 1st of May of the succeeding year; and by sub-section 2 it is provided that "it shall be the duty of the clerk, immediately after the passing of such by-law, to send a certified copy thereof to the License Commissioners within whose license district the municipality is situate, and such by-law shall be binding upon the License Commissioners, and any shop license to be issued shall conform to the provisions thereof."

This section is confined to shop licenses. It does not refer to taverns, and it in no wise interferes with the resolution in question, for it was not urged that any by-law had been passed; and no by-law having been passed before the 1st of April, the municipality was not in the position to pass the by-law after the 1st of April, and therefore the



Judgment]

Rose, J.

license commissioners had the month of April in which to pass their resolutions without any fear of clashing with any by-law of the municipality. By section 4, to which I have referred, the commissioners are authorized to pass the resolutions referred to at any time before the 1st of May in each year. Therefore the municipality may pass a by-law before the 1st of April, and in doing so there is a whole month prior to the expiry of the license year, during which the commissioners may well exercise their power to pass resolutions.

Nor do I find anything in section 54 which interferes with the right to pass resolutions. From its terms there is no doubt that a municipality has the right to pass a by-law to regulate the closing of bar-rooms, and it may be that if the municipality chose to pass a by-law on the subject that that must govern and override the action of the commissioners.

In this case there has been no conflict between the action of the commissioners and the action of the municipality that I am aware of, and it is not necessary, therefore, to determine what must be done in case of a conflict.

Assuming that the governing power is in the hands of the municipality, then the action of the commissioners is subject to such governing power; but if such power be not exercised by the municipality, no reason has been urged to which I can give force why the license commissioners may not do as the statute expressly authorizes them to do, viz., pass a resolution for the purpose of regulating taverns and shops to be licensed.

I have not noted that any question was made upon the argument of the power of the Court to quash a resolution, and I am not to be taken as in any sense determining that such power exists.

In *Daniels v. Municipal Council, etc., of Burford*, 10 U. C. R. 478, Robinson, C. J., seemed to doubt the power to quash the resolution of a municipal council, the statute then in force, 12 Vic. ch. 81, only authorizing the Courts to quash by-laws.

And the same learned Judge in *Cæsar v. Municipality etc., of Cartwright*, 12 U. C. R. 341, held expressly that the Court had no jurisdiction over resolutions of municipal corporations to set them aside summarily in the same manner as by-laws. He said in terms, referring to the statute: "We find no such provisions in our statutes, and we have no common law jurisdiction over them, to set them summarily aside. They are not like the orders of justices in sessions, which are the judicial acts of a Court of record." Earlier in the judgment the learned Judge said, "If they pass illegal resolutions, such acts of theirs are simply void, and we doubt not they incur a liability by so transgressing their authority." (a)

Judgment.  
Rose, J.

This motion was made before me, following the practice on motions to quash by-laws. I have not, however, to consider how it would be were the proceedings brought up by *certiorari*, but I am inclined to think, having regard to the decision of the learned Chief Justice, to which I have referred, that I have no power to quash a resolution upon motion, as has been sought here. I do not speak more decidedly because the point was not argued, and it is not necessary to determine it in view of the manner in which I propose to dispose of this motion.

Mr. Wilkes was content that the license commissioners should pass a resolution amending the resolution complained of by striking out all of the first paragraph after the words "on the morning thereafter," and commencing with the words, "Nor during any further time," etc., down to and including the words "or lodger in the house," and all of the second paragraph after the words "in the discretion of the said magistrate," in the sixth line thereof.

Upon the commissioners passing the amending resolution to such effect, this motion may be dismissed without costs.

(a) See R. S. O. ch. 184, sec. 332.

## [COMMON PLEAS DIVISION.]

## REGINA v. SOUTHWICK (TWO CASES).

*Intoxicating Liquors—Liquor License Act—License Commissioner taking part in trial—Evidence of—Seat on platform—Provision for distress in conviction and not in adjudication—Sale to lodger during prohibited hours.*

During the trial of an offence under the Liquor License Act the license commissioner who was sitting at the counsel's table, went and sat in the constable's chair a few feet distant from the desk at which the magistrate was sitting, but there was no evidence to shew that he in any way improperly interfered in the trial :—

*Held*, that the license commissioner could not be deemed, under the circumstances, to have been sitting on the bench and taking part in the trial etc., contrary to sec. 95 of the Act.

An objection that the adjudication did not provide for distress, while the conviction contained such a provision, was overruled following *Regina v. Hartley*, 20 O. R. 481.

*Held*, also that secs. 54, 58 do not authorize the sale of liquor to a lodger in the licensee's house during prohibited hours ; the most that can be said is that the sale to the lodger does not thereby make him an offender.

## Statement.

THESE were motions by way of appeal from the order of GALT, C. J., refusing orders for certiorari.

The defendant was convicted for two several offences, one on the 25th July and one on the 26th July, 1891, the charges being in terms the same, namely, selling liquor during the time prohibited by "The Liquor License Act" without any requisition for medical purposes as required by the said Act being produced to the vendor or his agent.

In Hilary Sittings, February 2nd, 1892, of the Divisional Court, (composed of ROSE and MACMAHON, J.), *Du Vernet* supported the motion. The conviction is bad. Section 95 of "The Liquor License Act," R. S. O., ch. 194, enacts that no License Commissioner, etc., shall try or adjudicate upon any complaint, etc., while the evidence shews that James Ryan, one of the commissioners, took part in the trial and adjudication. He sat on the bench with the police magistrate, and this was a taking part in the trial. The case of *Regina v. London County Council*, 8 Times L. R. 175, is expressly in point, and decides that an act such as here was a

taking part in the proceedings, and therefore vitiated the Argument. conviction. See also *Regina v. Meyer*, 1 Q. B. D. 173, and same case reported as *Regina v. Harrison* 24 W. R. 392; *Regina v. Justices of Surrey*, 1 Jur. N. S. 1138; Oke's Magisterial Synopsis, 10th ed., p. 25. There was no plea of not guilty recorded, and therefore the magistrate improperly proceeded with the trial of the case: R. S. C. ch. 178, secs. 43, 45. The adjudication does not provide for distress while the conviction does, and therefore the conviction is bad on this ground. As to the sale on the 25th July, there was no offence proved under the Act. The sale was to a *bonâ fide* lodger, and the sale to a lodger is protected under secs 54, 58.

*Langton*, Q. C., contra. The license commissioner had no interest in the case within the meaning of the authorities. He took no part as justice on the trial of the case. The evidence shews that he never sat at the bench, but merely sat in the constable's chair some four feet distant from the desk at which the police magistrate was sitting, and which might be called the bench: *Regina v. Sproule*, 14 O. R. 375; *Regina v. Langford*, 15 O. R. 52; *Regina v. Brown*, 16 O. R. 41; *Regina v. Meyer*, 1 Q. B. D. 173; *Regina v. Klemp*, 10 O. R. 143, 156; *Waterford Local Board of Health v. West Riding and Grimsby R. W. Co.*, 35 L. J. N. S. Mag. Cas. 69. Then as to the non-recording of the plea of not guilty. This was not asked for on the trial, and it is too late now to take the objection. Then as to the omission of distress in the adjudication. It is not necessary that the adjudication should contain this. All that it is necessary that the adjudication should do is to award the penalty, and then sections 62-67 direct the means for afterwards enforcing it. This, however, has been disposed of by *Regina v. Flynn*, 20 O. R. 638; *Regina v. Hartley*, 20 O. R. 481. As to the sale being to a lodger, section 54 prohibits the sale to any one, and the exception with regard to lodgers, etc., does not authorize a sale to him. The most it does is to allow a lodger to drink on the premises liquor which he



Judgment. has purchased during the hours that liquor may be sold.  
Rose, J. There is evidence however that the sale was to other  
persons besides lodgers.

February 27th, 1892. ROSE, J.:—

The first point taken was that one of the License Commissioners, one James Ryan, had a seat upon the bench and took part in the trial and adjudication.

By sec. 95 of the Liquor License Act, R. S. O. ch. 194 no license commissioner or inspector who is a justice of the peace, is permitted to try or adjudicate upon any complaint for an offence committed within his district.

If, therefore, Mr. Ryan did sit to try or adjudicate, the objection is well taken. As a matter of fact on the evidence it does not appear that he had any seat upon what may be called the bench. There was a raised platform at the end of the court-room, upon which was a desk behind which the magistrate sat and which might be termed a "bench." On this platform to the right of the magistrate's seat was a chair placed for the constable within about four feet of the magistrate's seat. The magistrate was the police magistrate for the town of Tilsonburg and sat alone.

It would appear from the affidavit of the magistrate that sometime during the trial Mr. Ryan, who had theretofore been seated at the counsel's table, rose from the table and took his seat in the constable's chair having in his hand a book or pamphlet which he was reading. There is a conflict of testimony as to whether he did during the trial communicate with the magistrate.

On the conflicting testimony I do not think that I can say that he did. Mr. Ryan, the police magistrate, and the constable, all state most distinctly that he did not, and there is other testimony to the same effect. There, therefore, can be no finding of fact that Mr. Ryan sat upon the bench as a justice taking part in the trial or adjudication. The most that can be said is that he occupied a seat in the room near the magistrate so that if he chose he might

have communicated, and so as to appear to some to have communicated with the magistrate. Judgment.

Rose, J.

Mr. DuVernet urged upon us that his presence upon the platform or bench, as his witnesses called it, was sufficient to vitiate the proceedings.

The strongest case that he cited was, I think, *Regina v. London County Council*, 8 Times L. R. 175. Mr. Justice A. L. Smith, who read the joint judgment of himself and Lord Justice Coleridge, quoted from the judgment of Mr. Justice Blackburn, in *Regina v. Meyer*, 1 Q. B. D. 173, as follows, at p. 176 :—" We cannot go into the question whether the interested justice took any part in the matter (i.e., the discussion of the case). The question is, was he so interested in the matter that he ought not to have sat ? "

If we could find upon this evidence that the commissioner was sitting taking part in the case for the purpose of trying, or adjudicating, and thus contravening the statute, the case would be brought within the one above referred to ; but, as I have indicated the most I can say upon the conflicting statements is, that he sat in a position in the room which might give rise to suspicion, but which did not indicate to any one that he was a magistrate sitting upon the bench taking part in the trial of the cause. The case would present a somewhat different appearance if there had been a bench of magistrates of whom the commissioner, was one.

The evidence therefore falling short of showing that there was any improper interference with the trial by the commissioner I think this contention fails in fact. It is to be regretted that the commissioner placed himself in such a position as to awaken a suspicion or cause doubt in the mind of the defendant or those who were then present ; but as far as I am aware there is no case going the length to which we are asked to go upon the material which we have before us, and therefore we must decide against the defendant on such ground.

It was further urged that there was no plea recorded. It is not necessary to consider what would be the effect of

Judgment.

Rose, J.

not recording a plea because there is no evidence before us upon which we can say what the fact was.

The objection was also taken that the adjudication does not provide for any distress while the conviction does. This objection, however, was disposed of in *Regina v. Hartley*, 20 O. R. 481.

Mr. DuVernet urged that there was no evidence of any offence to sustain the conviction for sale on the 25th July ; that the party having the liquor was a *bonâ fide* lodger, and was entitled to purchase under the provisions of sec. 54.

The conviction, as has been pointed out, was for an unlawful sale during prohibited hours. The last clause of section 54 is as follows : "Nor shall any such liquor, whether sold or not, be permitted or allowed to be drunk in any such places during the time prohibited by this Act for the sale of the same except by the occupant or some member of his family, or lodger in his house." It will be observed that these words do not afford any license to sell, but are words prohibiting the drinking of liquor during the prohibited hours, whether sold or not, except that the occupant or some member of his family or lodger in his house may be allowed to drink. The fact, therefore, of liquor having been sold to a lodger does not under sec. 54 excuse the sale.

Section 58 was referred to by Mr. DuVernet, but I do not see how it helps him. That section makes "every person not being an occupant or member of his family or lodger in his house, who buys or obtains, or attempts to buy or obtain intoxicating liquor during the time prohibited by this Act for the sale thereof, in any place where the same is or may be sold by wholesale or retail \* \* guilty of an offence under this Act."

By implication it might be argued that an occupant or member of his family, or a lodger in his house, is permitted to buy or obtain liquor during the prohibited hours ; but such a positive prohibition as is found in the opening words of sec. 54 restraining the sale of liquor "to

any person or persons whomsoever," cannot be cut down by implication. Section 54 prohibits the sale. Section 58 makes certain purchasers offenders. The most that can be said is that a lodger buying liquor during prohibited hours is not made an offender. However that may be, I think the positive prohibitory words of sec. 54 must be given effect to and that Mr. DuVernet's argument cannot obtain. No other section was pointed out or relied upon as affecting this matter; and, for the reasons I have given, I think that neither section 54 or 58 can assist the appellant.

Judgment.

Rose, J.

The appeals fail and must be dismissed with costs.

MACMAHON, J., concurred.

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## [COMMON PLEAS DIVISION.]

IN THE MATTER OF THE SCOTTISH ONTARIO AND MANITOBA  
LAND COMPANY, ETC.

*Overholding tenants—R. S. O. ch. 144, sec. 6—Motion to reverse finding of County Judge—Proper Court in which to move.*

An application under section 6 of the Overholding Tenants' Act, may be properly made to the Divisional Court ; and *Semble*, it is the only Court in which the motion can be made.

## Statement.

THIS was a motion by the tenant by way of appeal from an order of FALCONBRIDGE, J., dismissing a motion on his behalf purporting to have been made under section 6 of R. S. O. ch. 144, being "An Act respecting Overholding Tenants," to set aside the proceedings taken before the Judge of the County Court of the county of Carleton which resulted in a writ being issued to put the landlords in possession of the premises in question.

In Hilary Sittings, February 6th, 1892, of the Divisional Court (composed of GALT, C.J., ROSE and MACMAHON, JJ.). *E. B. Brown*, supported the motion.

*Langton, Q.C.*, contra.

February 27, 1892. ROSE, J.:—

Section 6 provides that where a writ of possession has issued in pursuance of proceedings before a County Judge "the High Court may, on motion, within three months after the issue of the writ, command the County Judge to send up the proceedings and evidence in the case to the Court, certified under his hand, and may examine into the the proceedings," etc.

Mr. Langton objected that there was no right of appeal: that the section provided for a review of the proceedings by the High Court, and that when such proceedings were had the remedy under the section was exhausted, and no further hearing of the matter was provided for.

Mr. Brown did not dispute that once the matter had been before the High Court as a High Court there was no appeal from the judgment of the Court; but contended that as the section gave power to the Court to examine into the proceedings, the practice under the Judicature Act shewed that the applicant had a right to take the matter first before a Judge in Chambers and that from the order in Chambers an appeal lay.

Judgment.

Rose, J.

The order in this matter was made in chambers by my learned brother FALCONBRIDGE, and, if Mr. Brown's argument be right, of course an appeal lay from the decision of the Judge in Chambers to this Court.

After argument upon the appeal Mr. Brown was good enough to call our attention to the provisions of Rule 219, which enacts that "The following proceedings and matters shall be heard and determined before the Divisional Courts; but nothing herein contained shall be construed so as to take away or limit the power of a single Judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so, or so as to require any interlocutory proceeding therein, heretofore taken before a single Judge, to be taken before a Divisional Court." And among the proceedings are "Proceedings directed by any statute to be taken before the Court, and in which the decision of the Court is final."

It is manifest from the reading of such Rule that the motion under section 6 is properly made to the Divisional Court.

It does not become necessary in this case to consider whether, prior to the passing of Rule 219, there was power in a single Judge to hear and determine such a matter, for upon hearing Mr. Brown upon the merits, we determined that it was not a case in which relief should be given.

Without deciding more than is necessary for the purpose of disposing of this matter, I am of the opinion that the Divisional Court is the proper Court in which to make such motion, and it may be that it would be found, if the

Judgment. matter were fully discussed, that it is the only Court in  
Rose, J. which such a motion could be made. If it be, then the  
order of my learned brother was without jurisdiction and  
hence not appealable; or, if it was with jurisdiction then  
it was a motion made before the High Court and unappeal-  
able; and on either ground, therefore, the appeal would fail.

The motion by way of appeal must, therefore, be dis-  
missed with costs; and the subsequent motion for relief  
under section 6 must also be dismissed with costs.

GALT, C.J., and MACMAHON, J., concurred.

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## [COMMON PLEAS DIVISION.]

## REGINA V. STAPLETON.

*Insurance—Accident—Fraternal societies—Insurance Act, R. S. C. ch. 124, secs. 49, 43—Conviction.*

The defendant with the alleged object of starting a branch of a society, called the "International Fraternal Alliance," having its head office in the United States, while in this province induced a number of persons to make application for membership therein, and to pay a joining fee of \$5, which in addition to certain alleged social benefits entitled a member on application therefor, and on payment of certain fees, to pecuniary benefits, namely, a certificate entitling the member to a weekly payment in case of sickness or accident and certain other sums in case of death or after a stated period. The defendant gave the applicants a receipt acknowledging the payment of the \$5 for, as stated, the purposes mentioned in an agreement written thereunder, namely, to forward to the head office the application on signature thereof, and if declined to return amount paid; but, if accepted, the payer was constituted a member, etc., entitled to the full benefits of all social, etc., advantages; and thereafter might secure all the pecuniary benefits on application therefor:—

*Held*, that the defendant was carrying on the business of accident insurance without having obtained the necessary license therefor contrary to section 49 of the Insurance Act, R. S. C. ch. 124; and that no protection was afforded by section 43, relating to fraternal, etc., societies, the scheme not being an insurance of the lives of the members exclusively; and the conviction therefor of the defendant for carrying on such business was therefore affirmed.

THE defendant was convicted by the police magistrate of the town of Oshawa, for unlawfully carrying on the business of insurance, other than the business of life, fire or inland marine; that is to say the business of accident insurance, on behalf of the International Fraternal Alliance, an insurance company within the meaning of section 2 of the Insurance Act, R. S. C. ch. 124, without the permission obtained from the Minister of Finance and Receiver General of the Dominion of Canada, and without the license required by law in that behalf, etc. Statement.

The evidence shewed that the defendant, who was what was termed a deputy president of a society called "The International Fraternal Alliance," having its head office in Baltimore, United States, and whose duty it was to organize branches of the society, came to Oshawa with the object of starting a branch of the society there. He



Statement.

solicited a number of persons to make application for membership of the branch to be so formed. Persons joining were to pay a joining fee of \$5, and on payment of certain monthly and quarterly payments, and on application therefor were entitled to obtain a certificate entitling them to obtain a weekly payment of \$7 in case of sickness or accident; in case of death the amount paid in with \$50 per year added, and \$700 at the end of seven years; or, on payment of certain additional fees, the \$700, instead of being paid at the end of seven years, was to be paid by instalments of \$200 at the end of three and five years, and \$300 at the end of the seven years. Several persons paid defendant the joining fee of \$5, and received from him the following document, which he filled in and signed:—

“THE INTERNATIONAL FRATERNAL ALLIANCE.

*Membership Receipt.*

Place,..... Rec'd of.....the sum of..... dollars, as a joining fee for the purpose provided in the following agreement. Signed.....Attorney.

*Agreement.*

In consideration of the above sum of money received by said attorney, he agrees to forward the application of the payer thereof to the Home office of the Order of the International Fraternal Alliance at once upon its signature by said payer; and if said application be not accepted to return to the said payer the full amount received thereon, within fifteen days from the date hereof. Said application, if accepted, to constitute said payer a member of said Order, entitled to the full benefits of all its social and moral advantages. Thereafter said member may secure all the pecuniary benefits to be awarded by said membership upon application therefor, according to the rules of the Order and the conditions of the same; and, in case said benefits be applied for, this receipt shall be accepted by said Order at any time of payment, so far as it applies, for all or any joining fees required to be paid to secure said benefits.”

The evidence also shewed that neither the permission of

the Minister of Finance and Receiver General nor any Argument.  
license had been obtained.

In Hilary Sittings, February 1st, 1892, before a Divisional Court, composed of GALT, C.J., ROSE and MACMAHON, JJ. Lount, Q.C., moved for an order *nisi* to quash the conviction. The case comes within sec. 43 of the Insurance Act, which provides that nothing in the Act contained should apply to any society or association of persons for fraternal, benevolent or industrial purposes, among which purposes is the assurance of the lives of the members thereof exclusively, or to any association for the purpose of life insurance formed in connection with such society or organization and exclusively for its members, and which insures the lives of its members exclusively. Under this section accident insurance by the society is allowable. The section says that life insurance is among the purposes authorized; but it does not say that accident insurance shall not be included. The next point is that no certificate of insurance was ever issued. This is something that a member may apply for, but in none of the cases here had it reached that stage.

February 27th, 1892. ROSE, J. :—

It appears from the evidence that the defendant did receive \$5, which, I think, upon the evidence, was a premium within the meaning of sec. 49, sub-s. 3. I do not see any ground upon which the order *nisi* should be granted. I have gone carefully over the evidence, and it seems to me abundantly clear that there was evidence to support the finding of the magistrate that the scheme was one of accident insurance and would come expressly within the words "No company or person shall issue any policy, other than a life," etc. I am also of the opinion that sec. 43 does not in any wise assist the defendant, such section merely excepting from the operations of the Act, "Any society or association of persons for fraternal, benevolent, industrial or religious purposes among which purposes is the insur-

Judgment.

Rose, J.

ance of the lives of the members thereof exclusively." This scheme was not one of "insurance of the lives of the members exclusively," but was a scheme of accident insurance, even if the evidence justified the finding that this society or association was for "fraternal, benevolent, industrial or religious purposes," which I very much doubt. I should not quarrel with the finding that this was a scheme, or contrivance to avoid the provisions of the statute. It is not necessary, however, to form any definite opinion upon such question, as I do not think it possible to yield to Mr. Lount's argument that the business of accident insurance is covered by the words "fraternal, benevolent, industrial or religious purposes." If the association desire to carry on an accident insurance business it must take the steps pointed out by the statute, and obtain permission from the requisite authority.

In my opinion the order must be refused.

GALT, C. J., and MACMAHON, J. concurred.

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## [COMMON PLEAS DIVISION.]

## MCLEAN V. CLARK.

*Partnership—Ostensible member of firm—Evidence.*

The defendant, who had been carrying on a general store and hardware business, sold the general business, retaining the hardware portion, taking from the vendee, to secure payment of the purchase money, a chattel mortgage thereon, the mortgage also covering future purchases. The general business continued to be carried on in a firm name, the defendant's name appearing with that of the purchaser on the same premises as before; a partition separating the hardware from the general business, but with a door leading from the one to the other, generally kept open. A certificate was registered stating that the purchaser was carrying on the general business alone under the firm name. It was ostensibly carried on under the firm name, which was the name on the sign over the door, and in the bill heads and advertisements. The plaintiffs who had supplied goods to the defendant prior to the sale of the business continued to supply goods, which were charged to the firm, no notice being given them that defendant was not a member thereof, while the circumstances led to the belief that he was such member :—

*Held*, that defendant was liable for the goods so supplied to the firm.

THIS was an action tried before MACMAHON, J., without Statement.  
a jury, at Perth on the 14th April, 1891.

The action was brought to recover the amount of three bills of exchange drawn by the plaintiff, and accepted by the firm of Clark, Maitland and Co.; and also for goods sold and delivered by the plaintiff to Clark, Maitland & Co., between the 1st July, 1887 and the 1st February, 1889.

The learned Judge reserved his decision, and subsequently delivered the following judgment :

May 16th, 1891. MACMAHON, J.:—

The defendant James M. Clark, previous to the month of May, 1887, had been carrying on business as a general merchant at Smith's Falls, when he determined to separate the hardware portion from the other stock, consisting of dry goods etc., and disposed of the said stock of dry goods, etc., to Peter Maitland; and it was agreed that that



Judgment.  
MacMahon,  
J.

part of the business should be carried on under the name of Clark, Maitland & Co.; and, in accordance with such agreement, the business, which had formerly been carried on by the defendant Clark, had a sign placed over that part of the shop in which the dry goods business was carried on of "Clark, Maitland & Co." The defendant Clark was carrying on the hardware business as a separate business in a part of the same building, the business of the two establishments being divided by a partition with a door connecting them which was generally kept open. The dry goods business was extensively advertised in the papers at Smith's Falls, as the business of Clark, Maitland & Co., and letter heads were used with that heading.

There was no question about the plaintiff's understanding that up to July, 1888, Clark was a member of the firm of Clark, Maitland & Co., and the goods were sold to the firm on the understanding that he was the head of the partnership. Mr. Alexander Stewart, a member of the plaintiff's firm, avouched as to that fact; and Mr. Mathews, the plaintiff's traveller, who sold the goods to Clark, Maitland & Co. at the establishment in Smith's Falls, stated that he was fully under the impression that Clark was a partner, that the orders he took were in the name of the firm, and that Clark brought the firm's milliner over to see his samples at the hotel, telling Mathews that she would give the order.

Mr. Cable, who was traveller for McKay Brothers of Montreal, sold goods to the partnership firm; and he gave evidence that Clark told him that Maitland was doing the buying. He said that Clark was in the dry goods part walking about as if he was interested in the business.

As to all goods purchased before the 14th July, 1888, there can be no question as to Clark's liability therefor. It is as to the goods represented by purchases made from and including July 19th, 1888, to October 24th of same year (the whole amount of such purchases, after deductions for returns, being \$475.40), that there can be any question.

It came to the knowledge of the plaintiffs about the 14th

of July, 1888, from a conversation they had with Messrs. McKay Brothers, that Clark was then setting up that he was not a partner in the firm of Clark, Maitland & Co., and the plaintiffs then wrote to their traveller, Mathews, to interview Clark and ascertain what he had to say. Mathews following the instructions of his employers had an interview with Clark; and I find as a fact that Clark then stated to him that the mortgage that had been given was given by Clark, Maitland & Co. to secure to him (Clark) their indebtedness for the amount of the stock, which he represented as having been purchased by the firm at seventy cents on the dollar, and that he told Mathews that if the firm should not succeed, he would take over the business again, but that he did not think there was any danger of that happening.

I find in consequence of the statements made to Mathews, that the plaintiffs continued to supply goods to the firm of Clark, Maitland & Co., between the dates named, to the said amount of \$475.40; and I also find that the statements of account shewing the indebtedness of Clark, Maitland & Co., to the plaintiffs, were sent addressed through the post to the defendant J. M. Clark, and that in the statement of the 7th of February, the third sheet—which Clark denied having attached to that statement—was annexed thereto: that the correspondence written by Clark himself never shewed that he repudiated the claim that was being made on him, that the goods were being purchased from the plaintiffs as if the latter regarded him as a member of the partnership.

I think the plaintiffs are entitled to judgment as against Clark for the sum of \$299.36, with interest from the 6th day of November, 1889; and for the sum of \$460.58, with interest from the 6th February, 1889, together with full costs of suit.

The defendant Clark moved on notice to set aside the judgment entered for the plaintiffs, and to enter the judgment in his favour; or for a new trial, on the

Judgment.  
MacMahon,  
J.

## Statement.

ground that the defendant J. M. Clark was not a partner in the so-called firm of Clark, Maitland & Co., and was in no way liable for the debts thereof; or to reduce the judgment to the sum of \$299.36, as on or about the 14th of July, 1888, the plaintiff had knowledge that the defendant Clark was not a partner of Maitland.

In Hilary Sittings, February 8th, 1892, before a Divisional Court composed of GALT, C.J., and ROSE, J., *Britton*, Q.C., supported the motion. The evidence shews that the defendant, Clark, was not a partner. At the time of the sale to Maitland he sold all his interest in the dry goods and general store business, and ceased to have any interest in it; and a certificate was duly registered in the registry office stating that Maitland was the only person interested in the business. The defendant Clark did not hold himself out and no credit was given him as a partner. What took place between the defendant Clark and Mathews, the plaintiff's, traveller, did not amount to a representation that defendant Clark was a partner, and no credit was given on the faith of what then took place. In any event it could only apply to the goods supplied after that date: *Lindley on Partnership*, 5th ed., 44; *Reid v. Coleman*, 19 O. R. 93.

*McCarthy*, Q.C., contra. The question here is not whether there was a partnership as a matter of fact, but whether there was an ostensible partnership. No notice was given the plaintiff that Clark was not a partner; the sign over the door, was a firm-name, and represented Clark to be a member of the firm; and the two businesses were connected together in such a manner that a person visiting the place would come to no other conclusion than that it was all one business; and certainly from what took place between Clark and Mathews, Clark held himself out as liable. No case can be found in which it has been decided that a person occupying the position of the defendant would not be liable as a partner: *Lindley on Partnership*, 5th ed., 40, *et seq.*

February 27th, 1892. GALT, C. J. :—

Judgment.

Galt, C.J.

The statement of claim is based on three several bills of exchange which had been accepted under the name and firm of Clark, Maitland & Co.; and also on the ground that the defendants were indebted to the plaintiffs in the sum of \$1,381.74, and that being so indebted, the plaintiffs agreed to accept the guarantee of the defendants in consideration of an extension of time.

It appeared from the evidence that for some time previous to the month of May, 1887, the defendant J. M. Clark had been carrying on a general store business at Smith's Falls. In May, 1887, he determined to separate the hardware portion of the business from what may be called the general store account; and, in order to do so, he, on the 11th of May, 1887, entered into an agreement with his co-defendant Peter Maitland, whereby he transferred all his general store goods to the said Peter Maitland, taking back from the said Peter Maitland a chattel mortgage securing the payment of the sum of \$10,000, payable in five years. The business continued to be carried on on the same premises as those in which Clark had previously transacted it. There was a sort of partition in the store whereby the space occupied by the hardware business was separated from that occupied by the dry goods business, but in other respects the premises were occupied as before.

At the time when the agreement was entered into a discussion arose as to the name under which Maitland was to carry on his business. He expressed a desire to use the defendant Clark's name. At first the defendant objected but subsequently he consented to do so on the understanding that a certificate should be filed stating that he, the defendant Peter Maitland carried on and intended to carry on the trade and business as a merchant and dealer in general merchandise in the town of Smith's Falls, under the name of Clark, Maitland & Co., and that no other person was associated with him in partnership. Such a certificate was subsequently registered on the 25th of



Judgment. January, 1888. The defendant Clark had carried on business with the plaintiffs, who are merchants in Montreal, for some years previous to May, 1887, and, at the time when the agreement with Maitland was made, was indebted in a considerable sum to them, which has since been paid.

Galt, C.J.

In July, 1887, Mr. Mathews, a travelling agent of the plaintiffs, visited Smith's Falls, and after an interview with the defendant Clark, who introduced him to Maitland, obtained an order for a considerable quantity of goods. These goods were by instructions from Maitland charged in the name of Clark, Maitland & Co., and, as it appears from the evidence at the trial, between that day and December, 1887, a considerable quantity of goods, amounting to upwards of \$1,100 was supplied to Clark, Maitland & Co. It must be borne in mind that the defendant Clark was fully aware of the dealings between Peter Maitland and the defendants, and he never notified the plaintiffs that he had no longer any interest in the business. It appears to me that it was not only his duty to have done so in order to protect himself, but that as a matter of pure honesty he was bound to do so, because under the terms of the mortgage which he had received from Peter Maitland all goods purchased by Peter Maitland and brought on the premises became subject to his rights as a mortgagee.

It appeared from the evidence on behalf of the plaintiffs that the account, which had originally stood in the name of J. M. Clark, was changed to the name of Clark, Maitland & Co., but how, or by whose instructions that was done did not appear.

On the 10th April, 1888, the plaintiffs wrote to the defendant J. M. Clark as follows:—

“DEAR SIR,—We enclose accounts of both firms now considerably overdue, and as it is difficult for us to give so much accommodation without the use of notes, we have again to ask you to favour us with the same.”

In that letter was enclosed an account shewing that up to the 18th December the plaintiffs had supplied goods to

Clark, Maitland & Co., amounting to \$1,106, and subsequently to that, between that and the date of the letter \$204.19 more, making in all \$1,310.50.

In reply to this letter the defendant Clark wrote as follows:—

“DEAR SIRs,—Yours with statements received, and in reply would say that I am very sorry that I have not been able to close up my account with you ere this, but I will send you a part of it next week. Regarding C. M. & Co., I thought they had sent you a remittance since you last rendered the account. I spoke to Mr. Maitland on receipt of your letter, and he will give the matter his attention.”

It is manifest from this letter that the defendant raised no objection whatever as to his position in connection with Clark, Maitland & Co.

Again on the 7th May, 1888, the plaintiffs wrote to J. M. Clark as follows :

“We again enclose monthly statements of account and will be pleased to receive a good remittance in course of mail.”

To this letter there does not appear to have been any answer ; but, on the 19th June, 1888, they wrote again to J. M. Clark as follows :

“Dear Sir,—As we have only got one small remittance from you in a period of four months, and nothing from the firm, on accounts now considerably overdue, we feel that we are not getting our share of your cash receipts.”

It is plain from this that up to this time the plaintiffs treated the defendant Clark as representing not only his own business but the business of Clark, Maitland & Co., and that he never repudiated any responsibility on their account.

In July, 1888, the plaintiffs, in consequence of information which they had received, or rather, as I gather from the evidence, from Mr. Stewart, one of the plaintiffs, having seen an entry in the “test” that a chattel mortgage

Judgment. made by Maitland & Co. to Clark had been renewed,  
Galt, C.J. instructed their agent, Mr. Mathews, to make inquiry into the circumstances.

It is plain from Mr. Mathew's evidence that he did make inquiry. He did not see the mortgage, but the defendant Clark told him that he had taken a mortgage, but that it was simply to secure his interest in the goods which he had sold to Maitland; but, according to Mr. Mathew's evidence, and I see no reason to doubt it, he did not then repudiate any connection with Clark, Maitland & Co., and this is certain that he never informed Mr. Mathews that any goods which they might send to Clark, Maitland & Co. would be subject to seizure under his mortgage.

Under these circumstances it appears to me, as stated by my brother MacMahon in his considered judgment, that there can be no question as to the liability of Clark up to this period. Subsequent to July, 1888, other goods were furnished amounting to \$475.40, and it is as respects these that my learned brother entertained any doubt.

It is quite true that at that time, at an interview between Mathews and Clark, Clark informed Mathews that he had sold his stock to Maitland & Co., but he did not, as I have before stated, expressly inform him (Mathews) that he had no interest in it, but, as found by the learned Judge, he represented that the mortgage had been given by Clark, Maitland and Co., to secure to him their indebtedness for the amount of stock which he represented as being purchased by the firm.

It is quite true that the mortgage was given not by Clark, Maitland & Co., but by Peter Maitland alone, and therefore if Clark had shown the mortgage to Mathews it would have been evident that the mortgage was not from Clark, Maitland & Co., but from Peter Maitland to himself (Clark), but such does not appear to have been the case.

I consider it was the imperative duty of Clark under the circumstances, particularly when his attention was called to it by Mathews, to have fully informed Mr. Mathews as to the exact position of affairs, and not to have allowed the

plaintiffs to continue to furnish goods to Clark, Maitland & Co., whereby he, Clark, might be benefited and which in case of the insolvency of Clark, Maitland & Co., would entail a very serious loss on the plaintiffs. Clark, Maitland & Co., did subsequently fail in February, 1889, and, on the 12th day of October, 1889, the plaintiffs received from the assignee of Clark, Maitland and Co., the sum of \$621.78 the balance remaining unpaid being that which is found by the learned Judge in his judgment.

Judgment.  
Galt, C.J.

In my opinion this motion should be dismissed with costs.

ROSE, J.:—

When Clark allowed his name to appear to the world with Maitland as a partner in the firm of Clark, Maitland & Co., he then authorized Maitland under that name to contract with any one ignorant of the fact that he, Clark, was not a partner so as to pledge the credit of the firm and of him, Clark, as a member of the firm. To avoid such liability it would be necessary to shew actual notice to the creditor of the facts, and the onus of proving such notice was on Clark in this case.

I agree with the learned Chief Justice and the learned trial Judge, that Clark has failed to discharge such onus, and that the judgment must stand and this motion be dismissed.

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## [QUEEN'S BENCH DIVISION.]

## ROSS v. BUCKE.

*Defamation—Slander—Privileged occasion—Qualified privilege—Absence of actual malice—Evidence—Falsity of slander—Justification not pleaded.*

The defendant, who was the superintendant of a public asylum, said to a person who had formerly been a servant at the asylum, and who was engaged to be married to the plaintiff, that the latter, a maid-servant at the asylum, was "a contemptible thief," for which she brought an action of slander. Justification was not pleaded. The evidence shewed that the defendant honestly believed in the truth of the words spoken, and that he had reasonable grounds for his belief:—

*Held*, that the occasion on which the words were spoken was one of qualified privilege, in that the person addressed had an interest in receiving the communication, and that the plaintiff could not recover without proof of actual malice.

*Held*, also, that the use of the qualifying adjective "contemptible" was not evidence of actual malice.

*Coxhead v. Richards*, 2 C. B. 569; *Whiteley v. Adams*, 15 C. B. N. S. 392; and *Stuart v. Bell*, [1891] 2 Q. B. 341, followed.

*Seemle*, per FALCONBRIDGE, J., that evidence of the falsity of the slander given on the plaintiff's examination in chief should not have been received.

## Statement.

THE plaintiff was an unmarried woman, and at the time of the acts complained of was a servant employed in the public asylum for the insane at London, Ontario, of which institution the defendant was the medical superintendent.

The plaintiff sued (1) in two counts for slander; (2) for wrongful dismissal; and (3) for the return or refunding to her of \$9, which she claimed she was wrongfully compelled to pay to one Lizzie Gall.

Paragraph three of the statement of claim was as follows:—On the 3rd day of August, 1890, the defendant falsely and maliciously spoke and published of the plaintiff, in the presence of several persons, the following words: "You are a thief, and if you do not pay back those \$9 you stole from Lizzie Gall, I will telephone for a policeman and have you locked up in gaol."

Paragraph four:—On the 3rd day of August, 1890, the defendant falsely and maliciously spoke of the plaintiff to one Samuel Thompson, "Maggie Ross (meaning thereby the plaintiff) is a contemptible thief; she deliberately

stole \$9 from Lizzie Gall." The said Thompson was then, <sup>Statement.</sup> and previously had been, engaged to be married to the plaintiff, and, in consequence of the said statements by the defendant, the said Thompson broke off the said engagement and refused to marry the plaintiff.

The statement of defence (2) denied the speaking and publishing of the words; (3) set up that the defendant, being informed that the plaintiff had, at the said asylum, wrongfully taken \$9 belonging to Lizzie Gall, who was also a servant employed at the said asylum, did, in the presence of certain servants and officials of the said asylum, and in the discharge of his duty, insist that the plaintiff should make restitution to the said Lizzie Gall, which the plaintiff thereupon did; (4) that the defendant, being a friend of the said Samuel Thompson, afterwards, in the discharge of his moral and social duty to the said Samuel Thompson, told him the facts and circumstances leading to the dismissal of the plaintiff as a servant of the said asylum; and (5) that the words used by the defendant were spoken by him without malice and in the belief that they were true, so as to make them privileged communications.

The action was tried before STREET, J., and a jury at London, in the winter of 1890.

At the trial Samuel Thompson swore that the defendant sent for him to come to his office and told him: "I have a very painful thing to tell you; this Margaret Ross is a contemptible thief." Thompson further said that he told the plaintiff that if she did not prove herself clear the engagement would be broken off, and that it was broken off.

The defendant's account of the interview with Thompson was that he (defendant) said: "Sam, I have sent for you in a very painful matter, and I am very sorry to have to speak to you about what I have to say." "And then I began and I told him just as I have told you now the exact circumstances, as far as I knew them. I did not say

Statement.

Maggie Ross was a thief or that she was contemptible; I did not even say that she had stolen money."

Only one claim of damages for slander, viz., that relating to the words spoken to Thompson, went to the jury, the other matters charged in the statement of claim having been withdrawn from them.

The jury found a verdict for the plaintiff for \$500, and the trial Judge directed judgment to be entered for that sum.

At the Michaelmas Sittings of the Divisional Court, 1891, the defendant moved to set aside the verdict and judgment, and to enter judgment for him, on the grounds:

1. That no action lies against the defendant under R. S. O. c. 73, the provisions of which were not complied with, for either of the alleged slanders, which were spoken by the defendant in the execution of his office as medical superintendent of the asylum.

2. That the Thompson occasion being one of qualified privilege, and the learned Judge having so ruled, there was no evidence to submit to the jury of malice or excess of privilege, and the case should have been withdrawn from the jury.

3. That the Judge should have charged the jury that the Thompson occasion was privileged, and that there was no evidence of malice.

4. The verdict and judgment are against law and evidence, etc.

Or that said verdict and judgment be set aside and a new trial had,

5. Because the verdict is against law and evidence, and contrary to the Judge's charge, and

6. On the ground of improper reception of evidence of the falsity of the alleged slander contrary to objection made.

The motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J., on the 12th February, 1891.

*Osler*, Q. C., (with him *Bartram*) for the defendant. The Argument. allegation as to the words spoken to Thompson was one of special damage, and there is no allegation of general damage. Thompson broke off the engagement not on account of what the defendant told him, but because of what the plaintiff herself told him. The defendant cannot be made to pay damages for telling Thompson what he already knew. The defendant does not need to justify; it is a matter of limited privilege. The occasion was one of privilege between the defendant and Thompson. It was a friendly or social duty to make him acquainted with the circumstances. It comes under the general rules as to privilege. The latest case is *Todd v. Dun*, 12 O. R. 791; 15 A. R. 85. The trial Judge should have ruled as to whether or not it was an occasion of privilege, and not have left it to the jury as a question of fact.

The defendant is protected under R. S. O. ch. 73 as a public officer performing his duty, who has not received notice of action.

*W. R. Meredith*, Q.C., (with him *Weld*) for the plaintiff. All the circumstances are admissible in evidence where the question of privilege is raised: *Adams v. Coleridge*, 1 Times L. R. 84, where the plaintiff called witnesses to disprove the truth of the slander without objection, the question being whether there was *bonâ fides* or not.

The defendant here was not acting in the discharge of his duty as a public officer.

There was no privilege. The statement in *Odgers*, 2nd ed., p. 210, as to intimacy or relationship forming privilege, is too broad, and not justified by the authorities. I refer to *Todd v. Hawkins*, 8 C. & P. 88; *Coxhead v. Richards*, 2 C. B. 569; *Krebs v. Oliver*, 12 Gray (Mass.) 239; *Byam v. Collins*, 46 S. C. N. Y. 204; *Whiteley v. Adams*, 15 C. B. N. S. 392, 410; *Botterill v. Whitehead*, 41 L. T. N. S. 588, 590; *Davies v. Snead*, L. R. 5 Q. B. 608. At the highest the case is only one of qualified privilege, and the jury may from the time, manner, etc., infer malice. In *Spill v. Maule*, L. R. 4 Ex. 232, it was said that it was



Argument.

safe to take the opinion of the jury. I refer also to *Clark v. Molyneux*, 3 Q. B. D. 237; *Toogood v. Spyring*, 1 C. M. & R. 181; *Bennett v. Deacon*, 2 C. B. 628; *Wilcocks v. Howell*, 5 O. R. 360; *Cowan v. Landell*, 13 O. R. 13; *Dewe v. Waterbury*, 6 S. C. R. 143. Even if there was a qualified privilege, it was right that the case should go to the jury, because the defendant's conduct was arbitrary. There was malice in the sense that there was an indifference to results. The language was such as to remove the privilege.

*Osler*, in reply.

February 1, 1892. FALCONBRIDGE, J. :—

Only one claim of damages for slander went to the jury; the other matters charged in the statement of claim, having been withdrawn from them, are not substantially involved in the present motion, and are material only as having some bearing on the circumstances surrounding the second slander charged. Of course we are to assume that the jury adopted Thompson's account of the interview between him and the defendant.

1. As to the point raised under R. S. O. ch. 73, this objection was taken at the trial with reference only to the first charge, which charge was withdrawn from the jury as being on a privileged occasion. It might well be argued that in what defendant did on that occasion, when he was investigating a matter brought under his notice in his official capacity, he was entitled to the protection of the statute; but it does not seem to me arguable that in making the communication to Thompson, a man not in the service of the asylum, and after the inquiry was over and sentence passed on the alleged culprit, and execution done, the defendant was doing anything in the execution of his office.

2nd and 3rd. These objections may be treated together. On the argument it was contended for the defendant that the Judge should have withdrawn the case from the jury, and that rightly or wrongly he should have ruled whether

it was an occasion of privilege and not have left it to the jury to say whether it was or not. Defendant claimed that he was prejudiced in the matter of damages, by the jury having necessarily been obliged to consider the whole case, so as to arrive at a determination on that point. This is ingenious but fallacious. Counsel would have had a perfect right to address the jury on all the circumstances of the case, even if it had come down to a mere question of damages, which would have been the result of the Judge's ruling that there was no privilege.

Judgment.  
Falconbridge,  
J.

The submission of a question of law to the jury is no ground of exception if they decide it aright: *Krebs v. Oliver*, 12 Gray (Mass.) 239; *Byam v. Collins*, 46 S. C. N. Y. at p. 210.

I do not find English authority except the general proposition that if any question of fact arises with respect to the circumstances it must be left to the jury: *Spill v. Maule*, L. R. 4 Ex. 232.

So that the whole matter comes down to the question whether the Thompson occasion was one of privilege, qualified or otherwise.

Plaintiff quarrels with the rule laid down by Mr. Odgers Bl. \*210, as being too broad, and not supported by authority. That learned author says: "Such a confidential relationship exists between husband and wife, father and son, brother and sister, guardian and ward, master and servant, principal and agent, solicitor and client, partners, or even intimate friends; in short, wherever any trust or confidence is reposed by the one in the other."

In the present case the only interest which defendant had in Thompson was the interest which the defendant might reasonably be supposed to have in an ex-employé, who had been three years in the service of the asylum as a servant, and had left to seek other employment, and defendant says he had a high opinion of and a great regard for him. Whether that is such a recognized interest in Thompson's welfare as to justify the communication to him, without any request on Thompson's part, as privileged, is a point but not the sole point for decision.

Judgment. Mr. Odgers says: "A relation or *intimate friend* may confidentially advise a lady not to marry a particular suitor, and assign reasons," etc. Bl. \*212, citing *Todd v. Hawkins*, 8 C. & P. 88, which was a case of a son-in-law advising a mother-in-law, and against his own pecuniary interest; and *Adams v. Coleridge*, 1 Times L. R. 84, where the defendant was the lady's brother.

Falconbridge,  
J.

Neither of these cases bears out the dictum as to an intimate friend, who is not connected by any tie of kindred. No case going that length was cited to us, nor have I found any.

In the case of *Byam v. Collins*, 46 S. C. N. Y. 204, the judgment of the Fifth Department, delivered by Bradley, J., after consideration of the leading English and American cases, lays down the rule that the fact that the communication is founded on motives of love and friendship, arising from long-continued social and amicable relations, does not make it a privileged one, but it may be such when made in response to a request; see also *Krebs v. Oliver*, cited above.

But the case does not turn on this point alone, but on the consideration of the protection which is said to be derived from the relation in which the receiver of the information stands to the person who is the subject of it. And as to this the opinion of Tindal, C. J., and Erle, J., in *Coxhead v. Richards*, 2 C. B. 569 (in which case the Court was divided in opinion), seems to have been on the whole approved in the more recent cases, the last of which is *Stuart v. Bell* [1891] 2 Q. B. 341. I am therefore obliged to hold the words spoken by defendant to have been so spoken on a privileged occasion.

The remaining question is as to the reception of evidence of the falsity of the slander on the plaintiff's examination in chief. There is no justification pleaded, and defendant's counsel seems in cross-examination of plaintiff and her witnesses, and in the examination of his own witnesses, to have confined himself strictly to proving what information the defendant had at the time (not the facts on which

such information was based), and to proving what took place at the first interview when plaintiff was charged with the theft, and paid the money to Lizzie Gall. This involved evidence that plaintiff had admitted the taking of the money at that interview. If this line of action would let in the evidence complained of in reply, I suppose the objection would fail, or would be treated as waived, because the only effect would be that the plaintiff, having chosen to "enter that field," in her own case, ought not to be allowed to re-enter it to strengthen her position in reply.

But apart from this, the defendant's contention was that on these pleadings and at that stage of the case the evidence ought not to have been admitted, while the plaintiff claims that all the circumstances of the case are admissible in evidence when privilege is pleaded.

The only authority cited on either side was *Adams v. Coleridge*,<sup>1</sup> Times L. R. 85, before Mr. Justice Manisty, where the plaintiff called witnesses to disprove the slander, without objection being made by the Attorney-General and Mr. Charles, Q. C., who were of counsel for defendant. It may be that as a matter of policy they refrained from taking the objection, and it is noticeable that in that case the plaintiff and two of his witnesses left the box without being cross-examined.

I have not found any very recent English case on the point.

In *King v. Waring* (1803), 5 Esp. 13, the words charged the plaintiff with dishonesty and misconduct in service. Lord Alvanley allowed a witness, with whom plaintiff had formerly lived, to speak to her character while in his service. The only plea was not guilty.

In *Stuart v. Lovell* (1817), 2 Stark. 93, the plea was not guilty, and a witness was called by plaintiff to falsify the assertions in the alleged libel. But Lord Ellenborough said: "I cannot allow him to be called for the purpose of falsifying the assertions complained of. There is no plea of justification on the record, and therefore I can no more hear a falsification on the one side, than a justification on the other."

Judgment.  
Falconbridge,  
J.



Judgment. In *Cornwall v. Richardson* (1825), R. & Moo. 305, the  
Falconbridge, slander imputed stealing money, and justification was  
J. pleaded. Plaintiff proposed to call witnesses as to his  
general good character for honesty. Abbott, L. C. J.,  
interposed and rejected the evidence, saying that it made  
no difference as to the admissibility of such evidence, that  
there was a special justification.

In *Fountain v. Boodle* (1842), 3 Q. B. 5, the libel was:  
"I parted with her" (the plaintiff, a governess) "on account  
of her incompetency and not being lady-like nor good-  
tempered." Plea, not guilty. General evidence was given  
(apparently without objection) of the plaintiff's compe-  
tency, good temper, and manners, by witnesses who were  
her personal friends.

In *Brine v. Bazalgette* (1849), 3 Ex. 692, the alleged  
libel charged plaintiff, a surveyor, with want of skill and  
competence in a particular work. The pleas were not  
guilty, and that plaintiff was not a surveyor. Plaintiff  
tendered evidence to shew that on other occasions he had  
done work as a surveyor, in which he had evinced his  
competency and skilfulness. It was held inadmissible,  
Parke, B., saying, "The objection is that the evidence of  
the plaintiff's general competency as a surveyor was im-  
properly rejected. But I am of opinion that the charge  
imputes incompetency in a particular transaction merely.  
Evidence offered which does not deny incompetency in that  
transaction, but which is evidence of general competency  
only, is not admissible." If the sentence last quoted is to be  
read as meaning that evidence denying incompetency in that  
particular transaction would have been admissible, it is an  
authority in plaintiff's favour. And he goes on to say:  
"The case in the Queen's Bench" (*Fountain v. Boodle*) "is  
clearly distinguishable, as temper is a qualification of gen-  
eral character."

Unless where justification is pleaded, the truth or falsity  
of the charge is not in issue, and is not relevant. The law  
presumes the plaintiff's innocence, and on this record the  
plaintiff ought no more to be allowed to say on oath that

the \$9 were hers, and that she did not take any money of Lizzie Gall's, or of any one else, than the defendant to be allowed to prove that she had taken it. It may seem hard that plaintiff should not have the opportunity of asserting her innocence when defendant can, by shewing the information presented to defendant, and on which he claims to have acted, virtually marshall all the facts which point to plaintiff's guilt. But I am afraid that such is the law, and that the evidence ought to have been excluded.

As we have come to the conclusion that the defendant is entitled to judgment on the other branch of the case, I refrain from discussing the question whether the defendant would appear to have been so prejudiced by the admission of this evidence as to entitle him to a new trial.

ARMOUR, C. J. :—

At the close of the case the learned Judge said: "I think the occasion when the first words were spoken was a privileged occasion, a qualified privilege, and that there is no evidence that points to malice so as to require any question being left to the jury with regard to that. With regard to the statement to Thompson, I think that also may have been an occasion of qualified privilege, but that must be submitted to the jury as to whether what Dr. Bucke did is what a reasonable man would have done; whether he was justified, whether the circumstances justified it." And in his charge to the jury the learned Judge said: "It is undoubtedly the law that where a man is in the position in which Dr. Bucke is placed, and an accusation of this kind is brought against any person over whom he has jurisdiction and control, actions such as those he has performed here, and words such as he has uttered here, on the first of these occasions where there is no malice, are such as do not render him liable to damages in an action of this kind. That is the way I have ruled, and I must ask you to take that as being the law. The circumstances here were such as called upon him to act in

Judgment. some way or other; he acted and spoke in the performance of his duty, and having reasonable grounds to go upon. There is no evidence that he spoke with malice; and that being the case, the law is, as I understand it, that he is not liable to pay damages because of anything he uttered on that occasion."

This ruling was not objected to by the plaintiff, and it entitles the defendant to have judgment entered for him in respect of the claim of the plaintiff set forth in the third paragraph of the statement of claim.

And the question is whether the words charged to have been spoken by the defendant in the fourth paragraph of the statement of claim were so spoken on a privileged occasion, and if so spoken, whether there was any evidence of actual malice to go to the jury.

In *Coxhead v. Richards*, 2 C. B. 569, the authorities up to that time were all reviewed, and Tindal, C. J., there said (p. 596): "I do not find the rule of law is so narrowed and restricted by any authority, that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief, and with reasonable grounds for the belief, that it is true, will not be excused, though he has no personal interest in the subject-matter;" and Erle, J., said (p. 608), "There is also another class in which the protection appears to me to be derived from the relation in which the receiver of the information stands to the person who is the subject of it; as in the case of information given to prevent damage from misconduct; and for this class I think it is not essential that the giver of the information should stand in any relation to the other parties. It is clear that the rule is founded on a consideration of the importance of the information to the interest of the receiver. And this consideration has no reference to the source whence the information is derived."

In *Bennett v. Deacon*, 2 C. B. 628, Tindal, C. J., and Erle, J., adhered to the views expressed by them in *Coxhead v. Richards*.

In *Amann v. Damm*, 8 C. B. N. S. 597, Willes, J., said: "If it had been necessary, I should have been fully

prepared to go the whole length of the doctrine laid down <sup>Judgment.</sup> by Tindal, C. J., and Erle, J., in the case of *Coxhead v. Armour, C.J. Richards.*"

In *Whiteley v. Adams*, 15 C. B. N. S. 392, Erle, C. J., said (p. 413): "The rule has been laid down in the Court of Exchequer, and again lately in the Court of Queen's Bench, that, if the circumstances bring the Judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words pass in the honest belief on the part of the person writing or uttering them, he is bound to hold that the action fails."

In *Stuart v. Bell* [1891] 2 Q. B. 341, Lindley, L. J., said: "I have no hesitation in saying that the judgment of Tindal, C. J., (in *Coxhead v. Richards*), is the one which carries conviction to my own mind, and is the one which I consider the most accurate and safe to take as a guide; nor am I aware of any subsequent case in which that judgment has been disapproved." He also quotes with approval the judgment of Erle, C. J., in *Whiteley v. Adams*. And Kay, L. J., said that "The law on the subject cannot be better stated than in the words of Erle, C. J., in *Whiteley v. Adams*."

The evidence shewed that the defendant honestly believed in the truth of the words charged to have been spoken by him to Thompson, and there was no evidence that could have been properly submitted to the jury that he did not honestly believe in their truth; and in fact the evidence was all one way as to his honest belief, and the evidence also shewed, if that were necessary, that he had reasonable grounds for his belief. That Thompson had an interest in receiving the information imparted to him by the defendant, cannot seriously be questioned.

And under these circumstances the authorities which I have quoted compel me to hold that the occasion on which the words charged to have been spoken by the defendant to Thompson was one of qualified privilege, and that the



Judgment. learned Judge should have so ruled, and that the occasion  
Armour, C.J. being one of privilege, the plaintiff could not recover in  
respect of the words so charged to have been spoken,  
without proof of actual malice.

The occasion being one of qualified privilege, the implication of malice was rebutted, and the burden of proving actual malice lay upon the plaintiff, and I am of the opinion that she failed to shew actual malice or anything from which actual malice could reasonably be inferred.

It was contended, however, that the language employed by the defendant of itself afforded evidence of actual malice to go to the jury, but to this I cannot agree; the use of the qualifying adjective "contemptible" did not add to the reproach contained in the word "thief" and the defendant stated no more than what he believed and what he might reasonably believe.

See *Somerville v. Hawkins*, 10 C. B. 583; *Harris v. Thompson*, 13 C. B. 333; *Taylor v. Hawkins*, 16 Q. B. 308; *Spill v. Maule*, L. R. 4 Ex. 232.

"To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect gradually limit, if not altogether defeat, that protection which the law throws over privileged communications:" *Laughton v. The Bishop of Sodor and Man*, L. R. 4 P. C. 495, at p. 508.

In my opinion, judgment should be entered for the defendant in respect of the claim of the plaintiff set forth in the fourth paragraph of the statement of claim.

The judgment so entered will be with costs.

I refer also to *Clark v. Molyneux*, 3 Q. B. D. 237; *Jenoure v. Delmege* [1891] A. C. 73; *Brown v. Hawkes* [1891] 2 Q. B. 718, at p. 722, per Cave, J.

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## [QUEEN'S BENCH DIVISION.]

## HOLLINGER V. CANADIAN PACIFIC R. W. CO.

*Railways and railway companies—Negligence—Accident at crossing—51 Vic. ch. 29, sec. 256 (D.)—Ringing bell or sounding whistle—Other precautions—Unusual danger—51 Vic. ch. 29, sec. 260 (D.)—Engine and tender, a “train of cars”—“Stop, look, and listen.”*

In an action against a railway company for negligence, whereby the plaintiff was run over and injured by an engine and tender at a railway crossing where eight tracks crossed a public highway and where trains were continually shunting:—

*Held*, that where the company are not able to comply with the terms of sec. 256 of 51 Vic. ch. 29 (D.) as to ringing a bell or sounding a whistle at least eighty rods from a crossing, because the engine starts to cross within that distance, some other kind of precaution should be taken to warn the public of danger; and where, as in this case, the crossing is unusually dangerous, it is incumbent upon them to use even greater and other precautions than those required by the statute:—

*Held*, also, that an engine with tender, moving reversely, is a “train of cars” within the meaning of sec. 260, and some one should be stationed on the tender to warn persons crossing the track.

The rule “stop, look, and listen,” as applied by the Pennsylvania State Courts to persons about to cross a railway track, is not in force here and is not one that should be adopted.

THE plaintiff by her statement of claim alleged: (1) *Statement.* That she resided in the town of Orangeville, in the county of Dufferin, and the defendants were a railway company doing business in the Province of Ontario. (2) That on or about the 7th day of July, 1890, the plaintiff was walking along Mill street in the said town of Orangeville, where the same crossed the main tracks and switches of the defendants at their station in the said town, and at the same time an engine, with tender, belonging to the defendants, was without its being observed by the plaintiff moving noiselessly along one of their said tracks across the said street, and ran over and fractured one of the plaintiff's feet, thereby crippling her for life and causing her much pain. (3) That surrounding the place where the said tracks of the defendants cross the said street was a thickly populated neighbourhood, and a point where there was a great deal of travel, and the defendants were bound to take reasonable care to prevent accidents to persons travelling on the said highway, but that the defendants neglected to

## Statement.

station on the rear of the said tender a person who should warn persons standing on or crossing the tracks of the said railway of the approach of any train, nor did the defendants cause a bell to ring or the engine to whistle, nor did they give any other warning to the plaintiff of the approach of the said engine and tender, and the plaintiff alleged that by the negligence of the defendants the said accident was occasioned. (4) That the plaintiff was lawfully and without negligence on her part crossing in front of the said train at the time the aforesaid injuries were occasioned.

The defendants by their statement of defence denied all the allegations in the plaintiff's statement of claim, and they also denied all allegations of negligence therein contained.

## Issue.

The cause was tried at the Autumn Sittings 1891 of this Court at Orangeville by STREET, J., with a jury.

It appeared that the station grounds and yard of the defendants at Orangeville extend across and on both sides of the public highway running between the townships of Caledon and Garafraxa, and that the defendants had eight tracks running across this highway at their station grounds. That on the morning of the 7th July, 1890, the defendants commenced shunting in their station grounds, using an engine, with tender attached, for that purpose; they first drew some flat cars out of the freight shed siding to a switch, which was about five hundred feet to the west of the highway; they then shunted these flat cars down the east passenger siding, and the engine and tender, moving reversely, followed down after them on a different track, the engineer and fireman being upon the engine. The engineer stated that the flat cars had about twenty feet the start of the engine and tender, and that both the flat cars and engine were running down the grade towards the highway without being otherwise impelled than by the incline, the steam being shut off on the engine. The fireman stated that the flat cars had, he supposed, about six or seven car's length start of the engine and tender; the plaintiff, passing along

the highway, as she was crossing the track on which the engine and tender were, was struck by the tender, knocked down, and injured; the engineer did not know of the accident till he was told by the fireman, and the fireman stated that he saw the plaintiff when he was about twenty or thirty yards from the highway, that he saw her going across, but he thought she was going to do, as a great many did, walk up to the track they were going down on, and stand until they passed over, and then she would walk over, and consequently he gave her no caution; he also said that he commenced to ring the bell at the distance of 130 yards from the highway and continued to ring it until she was struck. There was, however, contradictory evidence as to the ringing of the bell, and as to the time at which it began to be rung; a witness gave evidence that he shouted to her, but his evidence was contradicted. No person was stationed on the tender to warn persons standing on or crossing the track of its approach, nor was any other precaution taken to protect persons using the highway. The plaintiff stated that she lived in the town of Orangeville, and was going from her residence on the south side of the defendants' railway along the highway to a store on the north side of the railway in the said town, that she heard the sound of wheels in the yard, that she looked and kept looking in every direction, that she saw the flat cars coming down and that they had just got across the highway when she was struck. A witness for the defence said that she appeared to be looking at the flat cars coming down and did not notice the engine until she was struck and knocked backwards.

The learned Judge left the following questions to the jury, which they answered in the following manner: 1, Q. Was the accident caused by any negligence of the defendants? A. It was. 2, Q. If so, what was the negligence which caused the accident? A. By the bell not ringing in sufficient time. 3, Q. Was the bell on the engine rung before the accident? A. It was. 4, Q. If so, for what distance was it kept ringing? A. A very short distance. 5, Q. At what

Statement.



Statement.

rate was the engine travelling? A. In or about six miles an hour. 6, Q. Was the place of the accident in a thickly populated portion of the town? A. It was not. 7, Q. Could the plaintiff by using reasonable care have avoided the accident? A. We believe plaintiff took reasonable precaution, her attention being taken by the flat cars moving. 8, Q. If the plaintiff is entitled to damages, at what sum do you assess them? A. We believe plaintiff was entitled to damages to the amount of \$800.

The plaintiff's counsel requested the learned Judge to tell the jury that the defendants were bound to station on the last car a person to warn persons on the crossing, but the learned Judge did not do so.

Upon the questions and the answers of the jury thereto, the learned Judge directed judgment for the plaintiff for \$800 and costs.

At the Michaelmas Sittings of the Divisional Court, 1891, the defendants moved to set aside the said judgment and to enter judgment for them on the following grounds: (1) That a nonsuit should have been entered upon the plaintiff's own evidence, as it appeared that she approached the crossing in question, which was a place of danger without taking any precautions whatever, as she should have done, to observe whether there was any engine or train approaching said crossing on the railway. (2) That the accident in question, upon the findings of the jury, regard being had to the evidence, would not have occurred if the plaintiff had been taking reasonable care in approaching the crossing, inasmuch as the jury have found that the bell was ringing, and that the train was not moving at such a rate of speed as would have prevented the plaintiff from stopping before reaching the track where the accident occurred if she had wished to do so. (3) That the plaintiff and her witnesses who swore that the bell was not ringing were not believed by the jury, but that the jury accepted the statements of the defendants' witnesses that the bell was ringing, and that the evidence upon that point established conclusively that the bell was ringing at the

blacksmith's shop, and that if so, regard being had to the Statement. speed of the engine, it was erroneous to find that the accident happened by reason of the bell not having been rung in sufficient time, as was found by the jury; or, in the alternative, for a new trial on the ground that the finding of the jury that the bell was not rung for a sufficient time was contrary to law, evidence, and the weight of evidence, and upon grounds taken by counsel for the defendants upon the motion for nonsuit and during the progress of the trial.

The motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J., on the 25th November, 1891.

*Wallace Nesbitt* and *Angus MacMurchy*, for the defendants. The answer to question seven was not a sufficient answer upon which to found a judgment for the plaintiff. Upon the evidence of the plaintiff and her witnesses a nonsuit should have been entered. The plaintiff should have used more care. The fact that the flat cars were shunting makes no difference. It was only necessary for the defendants to give warning, and they gave a double warning; the bell was rung and a man called out.

They referred to *Jones v. Grand Trunk R. W. Co.*, 16 A. R. 37; 18 S. C. R. 696; *Greenwood v. Philadelphia W. & B. R. Co.*, 17 Atl. Rep. 188; *Casey v. Canadian Pacific R. W. Co.*, 15 O. R. 574, 581; *Curtin v. Great Southern R. W. Co.*, 22 Ir. L. R. (1887) 219, at p. 234; *Johnston v. Northern R. W. Co.*, 34 U. C. R. 432, 439; *Newman v. London and South Western R. W. Co.*, 7 Times L. R. 138; and on the weight of evidence, *Grieve v. Molson's Bank*, 8 O. R. 162.

*Elgin Meyers*, Q. C., for the plaintiff. In her evidence the plaintiff over and over again says she looked in every direction before crossing, and that the rumbling came from the flat cars. I refer to *Peart v. Grand Trunk R. W. Co.*, 10 A. R. 191, 198; *Blake v. Canadian Pacific R. W. Co.*, 17 O. R. 177; *Beckett v. Grand Trunk R. W. Co.*, 8 O. R. at p. 609; 13 A. R. 174; 16 S. C. R. 713. The defendants were bound to give warning irrespective of the statute. The

Argument. defendants had no right to use their station yard on the highway as a shunting ground; they are trespassers *ab initio*: *Sibbald v. Grand Trunk R. W. Co.*, 18 A. R. 184. The defendants should have had a man stationed on the end of the tender to give warning: 51 Vic. ch. 29, section 260 (D). An engine and tender, moving reversely, constitute "a train of cars" within the meaning of that enactment.

*Nesbitt*, in reply, referred to *Weir v. Canadian Pacific R. W. Co.*, 16 A. R. 100; *New Brunswick R. W. Co. v. Vanwart*, 17 S. C. R. 35.

February 1, 1892. The judgment of the Court was delivered by

ARMOUR, C. J:—

The finding of the jury in answer to the seventh question was, in our opinion, a finding that the plaintiff was not guilty of contributory negligence, and so the learned Judge who tried the cause understood it.

But it was urged that upon the plaintiff's own evidence she was so clearly guilty of contributory negligence that there was nothing to go to the jury, and that the learned Judge should not have submitted the question to the jury, but should have dismissed the action, and the rule of "stop, look, and listen," as applied to a person about to cross a railway by the Pennsylvania State Courts, was invoked as a rule which we ought to adopt.

This rule is not binding on us nor does it so commend itself to our judgment that we think that we ought to adopt it, and a perusal of the cases on the subject in the Pennsylvania State Courts, from the case of *The North Pennsylvania R.R. Co. v. Heileman*, 49 Penn. State Reports 60, down to *Greenwood v. Philadelphia, W. & B. R. Co.*, 124 Penn. State Reports 572, does not satisfy us that those Courts would have applied this rule to a case of like circumstances to this.

The circumstances of every case differ from the circumstances of every other case, and it is impossible to frame a hard and fast rule applicable to every case. Judgment.  
Armour, C.J.

We think that in this case it would have been impossible for the learned Judge to have rightly held that there was contributory negligence; and we think moreover that the finding of the jury that there was none was a proper finding.

The plaintiff when crossing the defendants' railway had a right to assume that the defendants would not be guilty of any negligence, and with this assumption her conduct and that of the defendants and all the surrounding circumstances are to be taken into account in determining whether she was guilty of contributory negligence.

She was going along the highway and crossing the defendants' railway, as she had a lawful right to do; she was assuming, as she had a right to do, that the defendants would not be guilty of any negligence on their part; she looked and listened, she heard no whistle or other sound but the rumbling of wheels; she looked to see where the rumbling came from and saw the flat cars moving, and her attention being directed to them she was struck by the tender of the engine moving reversely on a different track but in the same direction as the flat cars and close behind them, a concurrence that she would not naturally expect.

In *Weir v. The Canadian Pacific R. W. Co.*, 16 A. R. 100, the plaintiff never looked or listened until his horses were on the track, and that was held to be such contributory negligence as disentitled him to recover.

*Pearl v. The Grand Trunk R. W. Co.*, 10 A. R. 191, and *Beckett v. The Grand Trunk R. W. Co.*, 8 O. R. 601; 13 A. R. 174; 16 S. C. R. 713, support the view that we have expressed.

See also per Rose, J., in *Blake v. The Canadian Pacific R. W. Co.*, 17 O. R. 177; *Coburn v. The Great Northern R. W. Co.*, 8 Times L. R. 31; *Robertson v. Maguire*, Court of Appeal (not reported).

The jury found that the defendants were guilty of negli-



Judgment. gence, and that the negligence which caused the accident  
Armour, C.J. was "by the bell not ringing in sufficient time," that the bell was kept ringing for "a very short distance," and that the engine was travelling "in or about six miles per hour."

The evidence shewed clearly that the defendants did not comply with the statutory requirement as to the ringing of the bell.

The statute 51 Vic. ch. 29, section 256, (D.) requires that "the bell, with which the engine is furnished, shall be rung, or the whistle sounded, at the distance of at least eighty rods from every place at which the railway crosses any highway, and be kept ringing or be sounded at short intervals, until the engine has crossed such highway."

There is no pretence that the whistle was sounded at all, and it is quite plain, taking even the evidence of the fireman, whose duty it was to ring the bell, that it was not rung at the distance of at least eighty rods from the highway. But it is said that they could not comply with the statute because the point at which they began to run reversely towards the highway was within eighty rods of the highway ; but the answer to this is that if they could not comply with the statute for this reason they ought to have adopted some other precaution to warn those travelling on the highway of the approach of the engine and tender : *Lett v. St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545.

But the point at which they began to run reversely towards the highway was at least two hundred yards from the highway, and according to the fireman's evidence he did not begin to ring the bell until they got within one hundred and thirty yards of the highway ; they had in fact traversed more than one-third of the distance from the point at which they began to move reversely to the highway before he began to ring the bell. They did not therefore comply with the statute so far as they could have complied with it, having regard to the fact that the point at which they began to move reversely towards the highway was within eighty rods from the highway.

It is evident moreover from the finding of the jury that they did not believe that the bell was kept ringing for the distance for which it was said to have been kept ringing. Judgment.  
Armour, C.J.

There is another requirement of the statute, however, which we think was obligatory upon the defendants to comply with and which they neglected to comply with, and were therein guilty of negligence. Section 260 provides that whenever any train of cars is moving reversely in any city, town, or village, the locomotive being in the rear, the company shall station on the last car of the train a person who shall warn persons standing on or crossing the track of such railway of the approach of such train.

This is a provision for the public good, and should accordingly receive such fair, large, and liberal construction and interpretation as will best insure the attainment of the object of such provision according to its true intent, meaning, and spirit; and we think that we are doing no violence to the words of this provision in holding that a locomotive and tender constitute a train of cars within the meaning of this provision.

A car is a wheeled vehicle or conveyance, including carriages, chariots, carts, waggons, trucks, etc., and a locomotive is a car carrying the motive power, and a tender is a car carrying the water and fuel for the locomotive, and shackled together they form a train of cars; a train signifying that which is drawn along, from *traho*, to draw. See *Cox v. The Great Western R. W. Co.*, 9 Q. B. D. 106.

If a locomotive and tender cannot be called a train of cars, neither can a locomotive and tender with one box platform or passenger car attached be called a train of cars.

And as the more cars are attached to a locomotive and tender moving reversely, the more noise is made and the more warning is thereby given, and as the fewer cars are attached to a locomotive and tender moving reversely, the less noise is made and the less warning is thereby given, are we to conclude that the legislature intended this provision to apply where there was less need of its application and not to apply where there was more need of its application?

Judgment. The application of this provision is much more necessary to an engine and tender moving reversely without any cars attached, because they are more noiseless, and are particularly noiseless where, as in this case, they are not propelled by steam power but simply allowed to run down grade.

Armour, C.J.

There are many cases in the books in which we think as wide a meaning has been given to the words of Acts of Parliament as we are giving to the words of this provision, some of which are to be found in Maxwell, 2nd ed., at p. 333 et seq.

We are of opinion that the defendants were guilty of negligence in that the fireman saw the plaintiff approaching the track upon which the engine and tender were moving and gave her no warning, and he so saw her when they were about twenty or thirty yards from the highway, a distance within which according to the engineer's evidence the engine could have been stopped; and we think that by the exercise of reasonable care on the part of the defendants the accident could have been avoided: *Radley v. London and North Western R. W. Co.*, L. R. 9 Ex. 71.

If the provision of section 260 is to be held not to apply to an engine and tender moving reversely, we think that, having regard to the dangerous character of the crossing where the plaintiff was injured, there being eight tracks across the public highway there, and having regard to the fact that the defendants were using this highway for the purpose of shunting cars across the same, it was incumbent upon the defendants to have used greater precautions than merely the ringing of the bell for the protection of persons travelling along this highway.

It is said that they are in no case bound to take any other precautions than those required by the statute to be taken by them, but we think that they are bound to do so when circumstances of peculiar danger require that they should do so.

To this effect is *Bilbee v. The London, Brighton, etc., Railway Co.*, 18 C. B. N. S. 584, and *Lett v. St. Lawrence & Ottawa Railway Co.*, 1 O. R. 545, and

the judgment of Spragge, C. J. O., in *Rosenberger v. Judgment. The Grand Trunk R. W. Co.*, 8 A. R. 482; and we <sup>Armour, C.J.</sup> do not think that what was said by Patterson, J., in *The New Brunswick R. W. Co. v. Vanwart*, 17 S. C. R. 35, was intended by him to be applicable to any circumstances but those he was discussing, for he quotes a paragraph from Lord Halsbury's judgment in *Wakelin v. London & South Western R. W. Co.*, 12 App. Cas. 41; but in that judgment Lord Halsbury said, "I can understand that circumstances might exist which might call upon the railway company to take unusual precautions, though not prescribed by statute." See also *Tuff v. Warman*, 2 C. B. N. S. 740; *Dowell v. The General Steam Navigation Co.*, 5 E. & B. 195; *Morrison v. The General Steam Navigation Co.*, 8 Ex. 733.

We do not discuss the question raised in *Lett v. St. Lawrence & Ottawa R. W. Co.*, 1 O. R. 545, as to the authority of the defendants to use a public highway for station grounds.

We think that the judgment is right and must be affirmed, and we dismiss the motion with costs.





A DIGEST  
OF  
\* ALL THE CASES REPORTED IN THIS VOLUME  
BEING DECISIONS IN THE  
QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY  
DIVISIONS  
OF THE  
HIGH COURT OF JUSTICE FOR ONTARIO.

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**ACCIDENT.**

*See* MASTER AND SERVANT—RAILWAYS AND RAILWAY COMPANIES, 5.

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**ACCIDENT INSURANCE.**

*See* INSURANCE, 4, 5.

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**ACTION.**

*Qui tam, Personal.*—*See* COUNTY COURTS, 2.

*Right of.*—*See* COVENANT—DEFA-  
MATION, 1—WATER AND WATER-  
COURSES.

*Right of Attorney-General to main-  
tain.*—*See* WAYS, 2.

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**ADJUDICATION.**

*See* INTOXICATING LIQUORS, 5.  
92—VOL. XXI O.R.

**ADMINISTRATORS.**

*See* EXECUTORS AND ADMINISTRA-  
TORS.

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**ADULTERY.**

*See* HUSBAND AND WIFE, 4.

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**ALIMONY.**

*See* HUSBAND AND WIFE, 4.

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**AMENDMENT.**

*See* DIVISION COURTS, 2, 4.

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**APPEAL.**

*From magistrates' Courts.*—*See*  
DIVISION COURTS, 2.

*Admission of new evidence on.*—  
*See* EVIDENCE.

**APPOINTMENT.**

*By will.*—See WILL, 1.

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**ARBITRATION AND AWARD.**

*Appointment of arbitrator.*—See MUNICIPAL CORPORATIONS, 2.

54 Vic. ch. 51 (O.)—*Effect of, on pending proceedings.*—See MUNICIPAL CORPORATIONS, 3.

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**ARREST.**

See MALICIOUS ARREST AND PROSECUTION, 1.

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**ASSESSMENT AND TAXES.**

R. S. O. ch. 193, sec. 52—"May," *meaning of.*—By section 52 of the Assessment Act, R. S. O. ch. 193, where the assessment in cities, towns, etc., is made by virtue of a by-law passed under that section, in the latter part of the year, such assessment may be adopted by the council of the following year:—

*Held*, that "may," as used here, is permissive only, and that the council of the following year are given the option of having a new assessment.

Overwhelmingly strong reasons of convenience in favour of having one assessment instead of two might justify the Court in giving to "may" the force of "must." *Re Dwyer and Town of Port Arthur*, 175.

See LIMITATION OF ACTIONS, 2—SALE OF LAND, 3.

**ASSIGNMENT.**

*For creditors.*—See BANKRUPTCY AND INSOLVENCY—CONSTITUTIONAL LAW, 5—EXECUTORS AND ADMINISTRATORS.

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**ATTORNEY-GENERAL.**

*Right to maintain action.*—See WAYS, 2.

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**AUDITORS.**

*Of school section—Duty of.*—See PUBLIC SCHOOLS, 2.

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**BANKRUPTCY AND INSOLVENCY.**

1. *Assignments and preferences—Inspector of insolvent estate—Purchaser of estate from assignee*—R. S. O. ch. 124.]—An inspector of an insolvent estate, appointed by the creditors under R. S. O. ch. 124, who acts towards the assignee in an advisory capacity, cannot become a purchaser of the estate at a private sale thereof.

*Seemle, per ARMOUR, C.J.*, that a private sale by an assignee to any creditor, without the consent of the others, would also be open to objection. *Thompson v. Clarkson*, 421.

2. *Assignments and preferences—R. S. O. ch. 124, sec. 2—Chattel mortgage to creditor by insolvent debtor over all his property—Pressure—Collusion.*—In an action to have a chattel mortgage made by a debtor to certain creditors declared fraudulent and void as against other creditors, it was found at the trial that at and before the time of the execution

of the mortgage, the debtor was in insolvent circumstances and unable to pay his debts in full, as he well knew; that the mortgagees were well aware of the fact and took the mortgage with full knowledge of it; that their object in taking the mortgage was to obtain security for their debt; that the necessary effect was to defeat, delay, and prejudice the creditors of the mortgagor, and to give the mortgagees a preference over the other creditors; and that the mortgagees at and before the execution of the mortgage knew that it would have such effect. It also appeared that the property covered by the chattel mortgage was all that the debtor had, and that he knew that he had many creditors who could not be paid:—

*Held, per ARMOUR, C. J., at the trial, following Molson's Bank v. Halter, 18 S. C. R. 88, that the mortgage was not assailable under R. S. O. ch. 124, sec. 2, notwithstanding the findings of fact, because the mortgagees had requested the debtor to give them the security.*

The judgment was reversed in the Divisional Court.

*Per FALCONBRIDGE, J.*—It follows from the findings of fact that the pressure was merely a sham pressure—a piece of collusion.

*Per STREET, J.*—There was *bonâ fide* pressure, but the doctrine of pressure does not apply where the debtor has transferred the whole of his property. *Davies et al. v. Gillard et al.*, 431.

*Sale of goods to defraud creditors—Immateriality of debt being due—R. S. C. ch. 173, sec. 178.]—See CRIMINAL LAW, 1.*

*See CONSTITUTIONAL LAW, 1—FRAUDULENT CONVEYANCES.*

## BANKS.

*Advance of money by, under sec. 53, sub-sec. 4 R. S. C. ch. 120—Bill of lading—Promise to transfer—Acquisition of—Goods attached by process in foreign country before bills of lading delivered—Conflict of laws—"Acquire"—"Hold"—Meaning of.]—A bank in this province, under an agreement with a customer, domiciled here, advanced money to him to enable him to buy cattle in this province, which, under the agreement, when purchased were to be forwarded by rail by him to Montreal, and to be shipped by steamship thence to Liverpool the bank having no control over the cattle until they reached the vessel, when they were to be received by the steamship for the bank, and the customer's possession and control over them was to end; bills of lading therefor in favour of the bank being then signed. The cattle were purchased and sent to Montreal as agreed on. On arriving at the steamship, and before the bills of lading were made out, a creditor of the customer attached the cattle under a writ of *saisie-arret*, but the steamship owners, disregarding the writ, signed the bills of lading and conveyed the cattle to their destination. The creditor subsequently recovered a judgment for the value of the cattle, in the province of Quebec, against the steamship owners, which the latter, having paid, sought to prove on the estate of the bank in winding up proceedings, but the claim was disallowed by the Master.*

On appeal from him it was:—

*Held*, that, apart from the Banking Act, R. S. C. ch. 120, by virtue of the agreement between the bank and its customer the possession and a special property in the goods passed



to the bank, of which the steamship owners were aware, and having assented thereto upon receipt of the cattle, before any process was served, must be taken to have held the cattle for the bank.

The agreement having been made, and the parties to it being domiciled in this province, the rights of the parties to it must be determined by the laws of this province and not those of Quebec, which, however, were not shown to be different:—

*Held*, also that the rights of the parties were entirely governed by the provisions of the Banking Act and following, though not altogether approving, *Merchants' Bank v. Suter*, 24 Gr. 356, that under sec. 53, subsec. 4 of the Act, the bank had, under the agreement and the facts proved, an equitable lien upon the cattle from the time of the making of the agreement, which prevailed over the attachment.

*Held*, lastly, that the bank "acquired" the bills of lading within the meaning of the Banking Act as soon as the cattle were received by the steamship, although it did not at that time actually "hold" the bills. The appeal was therefore dismissed. *Re Central Bank, Canada Shipping Company's Case*, 515.

See COMPANY, 3.

### BENEFIT SOCIETY.

See INSURANCE, 2—MASTER AND SERVANT.

### BILLS OF EXCHANGE AND PROMISSORY NOTES.

*Endorsement—Guarantee—Trust.*  
—A promissory note, for value received, at three months, was made

by one of the defendants to the order of the testator of the plaintiffs. Some years afterwards the maker conveyed his farm to his son, the other defendant, on a verbal understanding, unknown to the payee, that the son was to pay the father's debts, including the note. After the conveyance, the payee having pressed the father for security, the son, without any endorsement of the note by the payee, wrote his name on the back of it, all parties supposing that he had thereby rendered himself liable as endorser. Subsequently he made a payment on account to the payee.

In an action against father and son:—

*Held*, that no liability attached to the son, either as endorser or guarantor, or as trustee of the property conveyed to him. *Robertson et al. v. Lonsdale et al.*, 600.

*Forgery — Incomplete Note — Payee's name in blank.*] See CRIMINAL LAW, 3.

### BILLS OF LADING.

See BANKS.

### BILLS OF SALE AND CHATTEL MORTGAGES.

*Chattel mortgage to creditor—Pressure—Collusion.*] — See BANKRUPTCY AND INSOLVENCY, 2.

### BUILDING CONTRACT.

See WORK AND LABOUR.

### BUILDING LEASE.

See SETTLED ESTATES ACT.

## BY-LAW.

*Construction of Sewer—Quashing.*]—See MUNICIPAL CORPORATIONS, 2.

*Prohibiting Sunday preaching in Parks—Unreasonable—Uncertain.*]—See MUNICIPAL CORPORATIONS, 4.

*Absence of, allowing horses to run at large—Accident on railway track.*]—See RAILWAYS AND RAILWAY COMPANIES, 2.

*Necessity for, in opening up street.*]—See WAYS, 1.

## CASES.

*Attorney-General v. Jeffrey* followed, 10 Gr. 273.]—See CHURCH.

*Bailey v. Williamson*, L. R. 8 Q. B. 118, followed.]—See MUNICIPAL CORPORATIONS, 4.

*Re Barber*, 14 M. & W. 720, distinguished.]—See PUBLIC SCHOOLS, 2.

*Ex parte Bass*, 17 L. J. Ch. 219, 2 Phil. 562, followed.]—See PUBLIC SCHOOLS, 2.

*Boley v. McLean*, 41 U. C. R. 260, distinguished.]—See SURVEY.

*Re Boustead and Warwick*, 12 O. R. 488, specially referred to.]—See HUSBAND AND WIFE, 2.

*Brady v. Walls*, 17 Gr. 699, specially referred to.]—See HUSBAND AND WIFE, 2.

*Cæsar v. Municipality of Cartwright*, 12 U. C. R. 341, commented on.]—See INTOXICATING LIQUORS, 4.

*Re Caldwell*, 5 P. R. 217, followed.]—See EXTRADITION, 2.

*Chapman v. Newell*, 14 P. R. 208, followed.]—See PARTNERSHIP, 2.

*Coxhead v. Richards*, 2 C. B. 569, followed.]—See DEFAMATION, 3.

*Re Croskery*, 16 O. R. 207 dissented from.]—See DOWER.

*Daniels v. Municipal Council of Burford*, 10 U.C.R. 478, commented on.]—See INTOXICATING LIQUORS, 4.

*Day v. Day*, 17 A.R. 157, specially referred to.]—See FRAUDULENT CONVEYANCES, 1.

*Dean v. McDowell*, 8 Ch. D. 345, followed.]—See PARTNERSHIP, 2.

*Re Fairbairn and Sandwich East*, 32 U. C. R. 573, distinguished.]—See SURVEY.

*Finch v. Gilray*, 16 A.R. 484, followed.]—See LIMITATION OF ACTIONS, 2.

*Games v. Bonnor*, 33 W. R. 64, followed.]—See HUSBAND AND WIFE, 2.

*Re Graydon and Hammill*, 20 O. R. 190, followed.]—See SALE OF LAND, 3.

*Re Hague*, 14 O.R. 660, dissented from.]—See DOWER.

*Hicks v. Newport, etc., R. W. Co.* 4 B. & S. 403, note, distinguished.]—See MASTER AND SERVANT.

*Johnston v. Cline*, 16 O. R. 129, dissented from.]—See FRAUDULENT CONVEYANCES, 1.

*Les Ecclesiastiques de St. Sulpice de Montreal v. City of Montreal*, 16 S. C. R. 400, distinguished.]—See SALE OF LAND, 3.

*Male v. Bouchier*, 1 Ch. Ch. 359; 2 Ch. Ch. 254, followed.]—See CONTEMPT OF COURT.

*Martindale v. Clarkson*, 6 A. R. 1, dissented from.]—See DOWER.

*Mathers v. Helliwell*, 10 Gr. 172, distinguished.]—See MORTGAGE, 1.

*Merchants' Bank v. Suter*, 24 Gr. 356, followed, though not altogether approved.]—See BANKS.

*Molson's Bank v. Halter*, 18 S. C. R. 88.]—See BANKRUPTCY AND INSOLVENCY, 2.

*McDonald v. Murray*, 11 A. R. 101.]—See SALE OF LAND, 3.

*Re Parker*, 19 O. R. 612, followed.]—See EXTRADITION, 1, 2.

*Regina v. Hagerman*, 15 O. R. 598, followed.]—See EXTRADITION, 2.

*Regina v. Hartley*, 20 O. R. 481.]—See INTOXICATING LIQUORS, 5.

*Regina v. McGregor*, 19 C. P. 69, distinguished.]—See SURVEY.

*Robb v. Murray*, 16 A. R. 503, followed.]—See COUNTY COURTS, 1.

*Ross v. Grand Trunk R. W. Co.*, 10 O. R. 447, followed.]—See RAILWAYS AND RAILWAY COMPANIES, 1.

*Re Skinner*, 13 P. R. 276, 447, followed.]—See PUBLIC SCHOOLS, 2.

*Stuart v. Bell*, [1891,] 2 Q. B. 341 followed.]—See DEFAMATION, 3.

*Tanner v. Bissell*, 21 U. C. R. 553, distinguished.]—See SURVEY.

*Tisdale v. Dallas*, 11 C. P. 238, distinguished.]—See SALE OF LAND, 3.

*Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Ex. 218, followed.]—See DEFAMATION, 2.

*Whiteley v. Adams*, 15 C. B. N. S. 392, followed.]—See DEFAMATION, 3.

*Re Wilson v. McGuire*, 2 O. R. 118, followed.]—See MUNICIPAL CORPORATIONS, 1.

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### CERTIORARI.

*When not necessary—Discretion of High Court to restrain invalid expropriation of land.*]—See RAILWAYS AND RAILWAY COMPANIES, 3.

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### CHATTEL MORTGAGE.

*To creditor — Pressure — Collusion.*]—See BANKRUPTCY AND INSOLVENCY, 2.

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### CHOSE IN ACTION.

*Equitable assignment—Order for payment of money—Estoppel.*]—The contractor for building a church, being indebted to D. for materials furnished therefor, gave him the following order on the defendants, who were the building trustees, and of which they were duly notified: "Pay to the order of D. the sum of \$306 out of certificate of money due me on 1st June for materials furnished to above church." This the defendants refused to accept, and on 31st May paid, out of moneys arising out of the contract, an order for a larger sum, made on that date in favour of another person, under an arrangement made by them with the latter alone:—

*Held*, that there was a good equitable assignment in favour of D. of money due on the 1st June; and that defendants, by the payment of the other order, were estopped from denying that there were sufficient moneys then due to the contractor to cover his order. *Bank of British North America v. Gibson et al.*, 613.

### CHURCH.

*Dispersed congregation—Sale of church property—Trust not ended—Trustees—Sale by—Sanction of County Judge—R.S.O. ch. 237, sec. 14, sub-secs. 1, 2 and 3—Corporate succession—9 Geo. IV. ch. 2, sec. 1.*]  
—In an application under the Vendor and Purchaser Act, R. S. O. ch. 112, in which the surviving trustee of a congregation, which had separated and ceased to exist, was making title to land belonging to the said congregation, but useless for its original purpose:—

*Held*, following *Attorney-General v. Jeffrey*, 10 Gr. 273, that the trust had not come to an end:—

*Held*, also that the sanction of the sale and the approval of the deed by the County Judge as provided for by R. S. O. ch. 237, sec. 14, sub-sec. 3, is sufficient in lieu of all that is required by sub-secs. 1 and 2:—

*Held*, also, that the statute 9 Geo. IV. ch. 2, sec. 1, gave to the trustees “the corporate attribute of succession,” and so created them a corporation, and that under the deed in question they took an estate in fee simple and had power to sell. *Re Wansley and Brown*, 34.

### CLEARING LAND.

See CROWN LANDS.

### COLLUSION.

See BANKRUPTCY AND INSOLVENCY, 2.

### COMPANY.

1. *Winding-up—Contributory—Purchase by company of its own shares—Transfer to “manager in trust”—Ignorance of transferor—Liability of manager as contributory.*]  
—The manager of an insurance company, authorized by the directors, with the moneys of the company, purchased from the holder thereof, who was ignorant of the object intended, a number of partly paid-up shares of the company on which calls were in arrear, for the purpose of cancellation, taking the transfer to himself “as manager in trust.” The company had no power to deal in its own stock. The shares were never cancelled, the dividends thereon being credited to the company:—

*Held*, in liquidation proceedings, that in the absence of knowledge by the transferor that the purchase was for an illegal purpose, the manager was properly placed on the list of contributories. *Re Union Fire Ins. Co.—McCord’s Case*, 264.

2. *Excess of assets over liabilities—Issue of shares at a discount—Winding-up—Contributories—R. S. C. ch. 129.*]  
—A joint stock limited liability company being indebted in a small amount, which was afterwards paid off, and having at the time assets worth more than double the amount of its issued stock and all other liabilities, allotted a number of shares to its shareholders, at a discount. Subsequently the company was freshly incorporated with the shares so issued treated as fully paid up, and afterwards falling into diffi-



culties, was put into liquidation under R. S. C. ch. 129 :—

*Held*, that these shareholders were not liable as contributories. *Re Owen Sound Dry Dock, Shipbuilding and Navigation Co. (Limited)*, 349.

3. *Winding-up — Foreclosure or sale by petition—R. S. C. ch. 129, sec. 39—Banks—Mortgage to secure future endorsements—R. S. C. ch. 120, sec. 45.*—On a petition by a mortgagee in the winding-up proceedings of a company, under R. S. C. ch. 129, asking for the conveyance to him by the liquidator of the company's equity of redemption, the court has jurisdiction to make the usual order for foreclosure or sale.

It is a matter of discretion with the court whether an action will be directed or summary proceedings sanctioned.

A mortgage upon land given to secure endorsements upon negotiable paper to be made by the mortgagee for the benefit of the mortgagor becomes operative only upon the endorsements being made ; and an assignment of such mortgage to a bank before the making of the endorsements, is not a violation of section 45 of the Banking Act, R. S. C. ch. 120. *Re Essex Land and Timber Co.—Trout's Case*, 367.

4. *Winding-up—Sale by the Court by tender—Extending the time—Accepting last in but highest—"Peremptorily closed."*—The words "peremptory" or "peremptorily" do not always mean "absolutely final," there being a discretion in the Court under special and urgent circumstances whether they shall have that meaning or not.

A sale by tender (not saying that the property will be sold to the high-

est bidder) is a mere attempt to ascertain whether an offer can be obtained within such a margin as the seller is willing to adopt.

In winding-up proceedings of a joint stock company, tenders were advertised for the purchase of the company's property, to be received by a certain time when the sale was to be "peremptorily closed." At the time fixed one tender only had been received, and the referee enlarged the time for the arrival of a train which was late. Two more tenders were received by that train ; one on behalf of the largest beneficiary under the mortgage, to enforce which the sale was being held, and the other by a stranger, which was a little higher than that of the beneficiary. The latter then by his agent handed in a much higher tender, whereupon the referee instructed notice of the last tender to be given to the other tenderers, and on a subsequent day accepted the last which was the highest tender :—

*Held*, that he was justified in so doing. *Re Alger and the Sarnia Oil Co.*, 440.

See **WAYS**, 2.

## COMPENSATION.

*For lands taken.*—See **RAILWAYS AND RAILWAY COMPANIES**, 1, 3.

*For services.*—See **WILL**, 4.

## CONFLICT OF LAW.

See **BANKS**.

**CONSTABLE.**

*Privilege.*]—See MALICIOUS ARREST AND PROSECUTION, 2.

*Chief—Tenure of office.*]—See MUNICIPAL CORPORATIONS, 5.

**CONSTITUTIONAL LAW.**

1. *Assignments and preferences—R. S. O. ch. 124, sec. 9—Ultra vires—Bankruptcy and insolvency.*]—Section 9 of the “Assignments and Preferences Act,” R. S. O. ch. 124, which provides that an assignment for the general benefit of creditors under that Act shall take precedence of all judgments and of all executions not completely executed by payment, etc., is a provision relating to bankruptcy and insolvency, and therefore *ultra vires* of a provincial legislature, by sub-sec. 21 of sec. 91 of the B. N. A. Act. *Union Bank v. Neville*, 152

2. *Prohibition—Revising officers—Electoral Franchise Act—Jurisdiction of the High Court of Justice.*]—There is no jurisdiction in the High Court of Justice to issue a writ of prohibition to a revising officer to compel him to abstain from “performing any duty under the Electoral Franchise Act.”

The legislation in regard to such matters does not trench upon nor is the question one of “property and civil rights in the province.”

*Re Simmons and Dalton*, 12 O. R. 505, not followed. *Re North Perth*, *Hessin v. Lloyd*, 538.

3. *Provincial Crimes—Power of legislature to enact procedure—Competency of defendant to give evidence.*]—Notwithstanding the reser-

vation of criminal procedure to the Dominion Parliament in sub-sec. 27 of sec. 91 of the “British North America Act,” a provincial legislature has power to regulate and provide for the course of trial and adjudication of offences against its lawful enactments, in this case a breach of “The Liquor License Act,” even though such offences may be termed crimes; and therefore to regulate the giving of evidence by defendants in such cases, which they have done by R. S. O. ch. 61, sec. 9, providing that where the proceeding is a crime under the provincial law, the defendant is neither a competent nor compellable witness. *Regina v. Bittle*, 605.

*Powers of Provincial Legislatures.*]—See MUNICIPAL CORPORATIONS, 1, 4.

**CONTEMPT OF COURT.**

*Non-performance of an act necessitating the payment of money—Committal.*]—On a motion to commit a party to an action for contempt of Court for non-compliance with a judgment directing a certain thing to be done, the Court will consider wherein the real disobedience consists, and if that in effect is the non-payment of money, will refuse the application as being in contravention of the statute R. S. O. ch. 67, sec. 6.

Such an application was refused where a defendant was ordered to procure a mortgage to be discharged by another person. *Roberts v. Donovan et al.*, 535.

*Male v. Bouchier*, 1 Ch. Ch. 359; 2 Ch. Ch. 254, followed. *Roberts v. Donovan et al.*, 535.

**CONTRACT.**

*Beneficial right—Action by stranger to enforce.*]—See COVENANT.

*Interest of mayor in.*]—See MUNICIPAL CORPORATIONS, 1.

See SALE OF LAND—VENDOR AND PURCHASER—WORK AND LABOUR.

**CONTRIBUTORIES.**

See COMPANY.

**CONVEYANCE.**

See FRAUDULENT CONVEYANCES.

**CONVICTION.**

*Quashing—No offence shewn—Question of costs considered.*]—A conviction under section 1 of 52 Vic. ch. 43 (D.), for supplying milk to a cheese factory from which the cream had been removed was quashed, as neither in the evidence or in the conviction was any offence against the Act shewn, it not having been proved that the milk was supplied to be manufactured; but without costs.

The Court in considering the question of costs suggested that in future with the notice of motion for a *certiorari*, a notice might also be served stating that unless the prosecution was then abandoned, and further proceedings rendered unnecessary, costs would be asked for, when a strong case would be made for granting the defendant costs in cases in which it would be unjust and unfair to put defendant to such costs. *Regina v. Westgate*, 621.

See INSURANCE, 3.

**CORPORATION.**

See CHURCH—COMPANY—MUNICIPAL CORPORATIONS—PUBLIC SCHOOLS, 1.

**CORROBORATION.**

See EXTRADITION, 2.

**COSTS.**

*Of quashing conviction.*]—See CONVICTION.

*Appointment of arbitrator.*]—See MUNICIPAL CORPORATIONS, 2.

*Ratepayer applying for taxation of bill.*]—See PUBLIC SCHOOLS, 2.

See HUSBAND AND WIFE, 2—PARTNERSHIP, 2—INTOXICATING LIQUORS, 3—LIEN.

**COUNTY COURTS.**

1. *Jurisdiction—Ascertainment of amount—R. S. O. ch. 47, sec. 19, sub-sec. 2—Transferring action to High Court—54 Vic. ch. 14 (O.), retrospective.*]—An action was brought in a County Court to recover the amount of a broker's commission on the sale of land. The defendant disputed his liability, and the action was tried by a jury, who found that the plaintiff was entitled to recover \$250. The amount was not ascertained otherwise than by the agreement of the parties, as found by the jury.

*Held*, by ROSE, J., that the amount was not ascertained within the meaning of R. S. O. ch. 47, sec. 19, sub-sec. 2, and the County Court had no jurisdiction.

*Robb v. Murray*, 16 A. R. 503, followed.

*Held*, by a Divisional Court, that the Act 54 Vic. ch. 14 (O.), passed after the determination that the County Court had no jurisdiction, was retrospective, and enabled the action to be transferred to the High Court. *Re McKay v. Martin*, 104.

2. *Equity jurisdiction*—32 Vic. ch. 6, sec. 4—*Judicature Act*—*Quia tam action by ratepayer of school section to recover moneys improperly paid out by trustees*—“*Personal actions*”—R. S. O. ch. 47, sec. 19—*Power to transfer to High Court*—R. S. O. ch. 47, sec. 38—*Prohibition*—*Solicitor and client*—*Bill of costs*.]—Since 32 Vic. ch. 6, sec. 4, the County Courts have had common law jurisdiction only; the Judicature Act did not alter the jurisdiction of those Courts, but only made applicable to matters cognizable by them the several rules of law thereby enacted and declared.

An action by a ratepayer of a school section, on behalf of himself and all other ratepayers, against trustees of the section, seeking to compel the defendants to pay to the treasurer of the section such amount as might be disallowed upon taxation of a bill of costs paid by the trustees to a solicitor, is one of purely equitable jurisdiction, and is not cognizable by a County Court, even though the amount in question is not more than \$200.

The term “personal actions” used in R. S. O. ch. 47, sec. 19, means common law actions.

If a County Court has no jurisdiction over the plaintiff’s cause of action, the proceedings in respect thereof in that Court are all *coram non iudice*, and the Judge of that Court has no power over them; sec.

38 of R. S. O. ch. 47, applies only where the action in which the equitable question is raised is within the jurisdiction of the County Court.

Prohibition granted to restrain a Judge from transferring to the High Court an action brought in a County Court for an equitable cause of action. *Re McGugan v. McGugan et al.*, 289.

3. *Jurisdiction*—*Partnership*—*Action by partner to recover his share of money paid firm*—*Prohibition*.]—A County Court has jurisdiction, where the amount of the claim does not exceed the ordinary jurisdiction of the Court, to entertain an action by a partner against his co-partners for a purely money demand, which is part of the partnership assets, although it may involve the taking of the partnership accounts. *Allen v. Fairfax Cheese Company*, 598.

*Junior judge*—*Jurisdiction of*.]—*See* EXTRADITION, 1, 2.

*County judge*—*Jurisdiction of*.]—*See* RAILWAYS AND RAILWAY COMPANIES, 3.

*See* INTERPLEADER.

## COUNTY JUDGE.

*Appeal to from Revising Officer*.]—*See* PARLIAMENTARY ELECTIONS.

## COURT.

*Sale by*.]—*See* COMPANY, 4.

*Contempt of*.]—*See* CONTEMPT OF COURT.



*Payment into.*] — See SALE OF LAND, 3.

See COUNTY COURTS—DIVISION COURTS.

### COVENANT.

*Beneficial right thereunder—Action by stranger to enforce—Equitable execution—Receiver.*]—Where the effect of a contract is to give a stranger to it a beneficial right thereunder he may enforce such right by action.

And where in an agreement for the exchange of certain lands between the sons of the defendant and a third party, which was carried out, and in which the defendant released her dower, and also conveyed lands of her own to the third party for the benefit of her sons, in consideration whereof they jointly with her covenanted with such third party to pay her an annuity to be secured by mortgage it was :—

*Held*, that although not named as a covenantee she was entitled to maintain an action to enforce such covenant, and that a judgment creditor of hers was entitled to have equitable execution against her, and a receiver appointed to receive payment of the annuity. *Moot v. Gibson*, 248.

See MORTGAGE—SALE OF LAND, 3.

### CRIMINAL LAW.

1. *Sale of goods to defraud creditors—Immateriality of debt being due—R. S. C. ch. 173, sec. 28.*]—Under the 28th section of R. S. C. ch. 173, every one who makes or causes to be made, amongst other

things, any assignment, sale, etc., of any of his goods and chattels with intent to defraud his creditors, or any of them, is guilty of a misdemeanor :—

*Held*, it is not essential under the Act that the debt of the creditor should, at the time of the sale, etc., be actually due. *Regina v. Henry*, 113.

2. *Rape—Evidence of commission of offence—Evidence, admissibility of.*]—On a trial for rape, the evidence of the prosecution was that the prisoner knocked her down, got on her, pulled up her clothes and committed a rape on her. A witness proved that the prisoner stated that he did no more than her husband would have done.

Evidence was admitted of a statement made by prisoner's counsel at a previous trial on behalf of prisoner, that prisoner had had connection with the woman with her consent, and that he had paid her \$1.00 :—

*Held*, that there was sufficient evidence of the commission of the offence ; and that the statement of the prisoner's counsel was properly admitted. *Regina v. Bedere*, 189.

3. *Forgery—Incomplete note—Payee's name in blank.*]—Where, in an instrument in the form of a promissory note, a blank is left for the payee's name, it is not a complete note so as to support a conviction for the forgery thereof, or for the forgery of an indorsement thereon ; nor is it a document, writing or instrument within secs. 46, 47 or 50 of R. S. C. ch. 165.

*Semble*, a conviction might have been sustained on an indictment for forgery at common law. *Regina v. Cormack*, 213.

*Provincial crimes.*—See CONSTITUTIONAL LAW, 3.

*Accident insurance, carrying on business of.*—See CRIMINAL LAW, 5.

### CROWN LANDS.

*Crown Timber License—Right to sell pine*—R.S.O. (1887), ch. 25, secs. 10, 11—*Sale of pine not cut during process of actual clearing.*—A locattee of land whose rights are governed by R.S.O. (1887), ch. 25, sec. 10, or a patentee whose rights are governed by *ib.*, sec. 11, though he may really intend to clear a parcel of land, cannot simply point out such parcel to a purchaser before anything was done in the way of clearing it for cultivation, and sell to such purchaser the pine timber standing and growing upon such parcel.

The right or liberty in such cases is only to cut and dispose of trees during the process of actually clearing the land for cultivation, when it appears to be and is requisite that the trees should, for the purposes of such clearing, be removed. *McArthur Bros. Company (Limited) v. Deans*, 380.

### DAMAGES.

1. *Measure of—Breach of agreement to convey land—Loss of bargain previously made.*—Loss of profit sustained by, and the expenses which a purchaser of lands has been put to, on a resale by him, unknown to his vendor, before such purchaser has entered into a binding contract for purchase, are not damages naturally flowing from the breach of the latter agreement, and cannot be recovered by him against his vendor.

In such a case, if recoverable at all, the true measure of damages would be the increased value of the land, at the time of the breach, over the purchase money. *Loney v. Oliver*, 89.

2. *Undertaking as to—Injunction—Dismissal of action at trial—Refusal of reference as to damages.*—The jurisdiction to award an enquiry as to, or to assess damages without a reference, where an injunction has been granted and an undertaking as to damages given, is a discretionary one, to be exercised judicially and not capriciously.

Where, in an action to set aside a sale of goods as fraudulent, a claim for damages by reason of an injunction was set up in the defence, and the trial Judge was, on the evidence, of opinion that no damage was proved occasioned by the injunction as distinct from the detriment arising from the litigation, and no additional evidence having been given, the Divisional Court under the circumstances of this case, where the defendant was given his costs, although his conduct had been such as properly to provoke legal enquiry, refused to award a reference as to damages.

Decision of ROSE, J., affirmed. *Gault et al v. Murray et al*, 458.

*Allegation of special.*—See DEFAMATION 2.

See LIMITATION OF ACTIONS, 1—PARTNERSHIP, 2—VENDOR AND PURCHASER, 1.

### DEDICATION.

See WAYS, 1.

**DEED.**

*See* FRAUDULENT CONVEYANCES.

**DEFAMATION.**

1. *Partners—Slander of firm—Right of action.*]—The two plaintiffs were the members composing a firm, which firm had sold out the business to a company composed of the plaintiffs and another, the old firm continuing in existence for the purpose of being wound up. In an action of slander, the inuendo charging insolvency to the company, the jury found that the imputation of insolvency had no reference to the company but to the plaintiffs as members of the firm :—

*Held*, that on a record properly framed, the two plaintiffs might recover for any damage accruing either to them as individuals or to the firm, without proof of special damage, and also as members of the company, for any special damage suffered by the company by reason of the slander of two members thereof, but on the record as framed here the plaintiffs must fail ; and as no amendment was asked for at the trial, and no reason given for allowing one on appeal to the Divisional Court, it was refused. *Bricker et al v. Campbell*, 204.

2. *Libel—False and malicious publication as to goods manufactured by plaintiffs—Allegations of special damage—Demurrer.*]—In an action of libel the plaintiffs' statement of claim alleged that the defendants falsely and maliciously published of and concerning the plaintiffs' goods " \* \* We do not keep Acme or common plate " and also alleged special damage :—

*Held*, on demurrer, that as the allegation was that the defendants " falsely and maliciously " published of and concerning the plaintiffs, etc., and as special damage was alleged in direct terms, following *The Western Counties Manure Co. v. The Lawes Chemical Manure Co.*, L. R. 9 Ex. 218, if the plaintiffs were able to prove that allegation, they would be entitled to judgment, and the demurrer was overruled. *Acme Silver Co. v. Stacey Hardware, etc., Co.*, 261.

3. *Slander—Privileged occasion—Qualified privilege—Absence of actual malice—Evidence—Falsity of slander—Justification not pleaded.*]—The defendant, who was the superintendent of a public asylum, said to a person who had formerly been a servant at the asylum, and who was engaged to be married to the plaintiff, that the latter, a maid-servant at the asylum, was " a contemptible thief," for which she brought an action of slander. Justification was not pleaded. The evidence shewed that the defendant honestly believed in the truth of the words spoken, and that he had reasonable grounds for his belief :—

*Held*, that the occasion on which the words were spoken was one of qualified privilege, in that the person addressed had an interest in receiving the communication, and that the plaintiff could not recover without proof of actual malice.

*Held*, also, that the use of the qualifying adjective " contemptible " was not evidence of actual malice.

*Coxhead v. Richards*, 2 C. B. 569 ; *Whiteley v. Adams*, 15 C. B. N. S. 392 ; and *Stuart v. Bell*, (1891) 2 Q. B. 341, followed.

*Semble*, per FALCONBRIDGE, J., that evidence of the falsity of the



slander given on the plaintiff's examination-in-chief should not have been received. *Ross v. Bucke*, 692.

### DEMURRER.

See DEFAMATION, 2—LIEN.

### DEVOLUTION OF ESTATES ACT.

See EXECUTORS AND ADMINISTRATORS.

### DISTRESS.

See INTOXICATING LIQUORS, 5.

### DIVISION COURTS.

1. *Prohibition—Judge reserving judgment without naming day—Garnishee summons—R. S. O. ch. 51, sec. 144—Acquiescence.*]—Section 144 of the Division Courts' Act, R. S. O. ch. 51, which provides that when a Judge reserves judgment he shall name a subsequent day and hour for the delivery thereof, applies as well to the Judge's decision upon the hearing of a garnishee summons as to his decision in any other case, and must be strictly complied with.

Where a Division Court Judge reserved judgment, endorsing the summons "judgment reserved till," but did not name a subsequent day and hour for the delivery thereof, nor adjourn the trial, prohibition was granted to restrain further proceedings, no acquiescence being shown on the part of the applicants. *Re Tippling v Cole*, 276.

2. *Prohibition—Appeal to Division Court from magistrates' order*

*under 51 Vic. ch. 23 (O.)—Notice of appeal—"Cause or matter"—Amendment.*]—By sec. 15 of R. S. O. ch. 139, which by sec. 11 of 51 Vic. ch. 23 (O.) is to regulate appeals to Division Courts from magistrates' orders for payment of maintenance moneys by husbands to wives, it is provided that the appellant shall give to the opposite party a notice in writing of his appeal, and of the cause or matter thereof, eight days at least before the holding of the Court at which the appeal is to be heard.

Where a notice of appeal was given in time, but did not state any "cause or matter" of the appeal:—

*Held*, on a motion for prohibition, that the Judge presiding at the Division Court had no power to allow the notice to be amended. *Re Coe v. Coe*, 409.

3. *Prohibition—Judge reserving judgment without naming day and hour—R. S. O. ch. 51, sec. 144—Prejudice—Waiver.*]—Where a Division Court Judge reserved judgment, but did not adjourn the trial, but endorsed on the summons "judgment in a week," not naming any hour, and on the day named delivered judgment, which was brought to the defendant's knowledge, whereupon he moved on the merits for a new trial, or to set aside the judgment, which was refused, otherwise acquiescing in the judgment, prohibition was refused. *Re McPherson v. McPhee*, 280, note, 411.

4. *Prohibition—Reservation of judgment without fixing day—Absence of prejudice.*]—The fact that a Division Court Judge has reserved judgment without fixing a day and time for the delivery thereof, is only ground for prohibition when the



party applying has been prejudiced thereby, and has not consented to the course adopted, and has not subsequently waived the objection. *Re Bank of Ottawa v. Wade*, 486.

5. *Prohibition quousque* — *Judgment for \$200.70—Interest—Jurisdiction—Amendment—Part prohibition.*]—Where a Division Court has jurisdiction at the time of the institution of an action, but, by the addition of interest accruing during its pendency, judgment is given for an amount beyond the jurisdiction of the Court, prohibition will be granted until the Judge amends the judgment by striking out the excess; or a partial prohibition will be issued to prevent the enforcement of judgment for the excess. *Re Elliott v. Biette et al.*, 595.

### DIVISIONAL COURTS.

*Admission of new evidence on appeal to.*]—See EVIDENCE.

### DOMICILE.

See HUSBAND AND WIFE, 1.

### DOWER.

*Bar of, in mortgage—Conveyance of equity of redemption by husband alone—Rights of wife—R. S. O. ch. 133, secs. 5, 6.*]—Under secs. 5 and 6 of the Dower Act, R. S. O. ch. 133, a wife who joins to bar dower in a mortgage of land made by her husband to secure part of the purchase money is entitled to dower notwithstanding a conveyance by him of the equity of redemption without her concurrence. The wife

so joining in the mortgage is not merely a surety for her husband; and she is entitled to dower out of the surplus only of the land or money left after satisfying the mortgage debt.

*Re Hague*, 14 O. R. 660; *Re Crookery*, 16 O. R. 207; and opinion of PATTERSON, J. A., in *Martindale v. Clarkson*, 6 A. R. 1, dissented from.

Judgment of ARMOUR, C. J., reversed. *Pratt v. Bunnell*, 1.

### DRAINAGE.

See MUNICIPAL CORPORATIONS, 3, 5.

### DRUGGIST.

*A sale of liquor by—Non entry in book.*]—See INTOXICATING LIQUORS, 2.

### EASEMENT.

*Acquiring for sewer.*]—See MUNICIPAL CORPORATIONS, 2.

### ELECTIONS.

See MUNICIPAL CORPORATIONS, 1  
—PARLIAMENTARY ELECTIONS.

### ELECTORAL FRANCHISE ACT.

See CONSTITUTIONAL LAW, 2—PARLIAMENTARY ELECTIONS.

### EQUITABLE ASSIGNMENT.

See CHOSE IN ACTION.

**EQUITY OF REDEMPTION.**

See DOWER—MORTGAGE, 1, 3.

**ESTATE.**

*Title to land—Adverse possession—32 H. VIII. ch. 9—Husband and wife—Estoppel—Subrogation.*]—In 1841 land was granted by King's College to G., who in 1849 conveyed it to a married woman, who, with her husband, was in possession at the time of the grant to G. The conveyance to the married woman was executed by her husband. The husband and wife lived together on the land till her death, in 1864, and the husband till 1870, he dying in January, 1889. In an action of ejectment begun in October, 1889, by the heirs-at-law of the wife against persons claiming through the husband:—

*Held*, reversing the judgment of ROSE, J., that the possession of the husband was not adverse at the time of the conveyance to G., and the conveyance to G. and the subsequent conveyance to the wife were operative, notwithstanding the statute 32 H. VIII. ch. 9, then in force.

*Per* ARMOUR, C. J.—The conveyance to the wife was made by the procurement of the husband, and he took an estate under it, and having no other right or title to the land, was estopped from denying the validity of G.'s title.

*Held*, also, upon the evidence, that the plaintiffs were not estopped by the dealings of their ancestress with the land, and that the defendants were not entitled to be subrogated to the rights of a mortgagee in whose mortgage she had joined as a granting party, but which had been paid off and discharged. *Marsh et al. v. Webb et al.*, 281.

94—VOL. XXI O.R.

*Purchase of bankrupt estate by inspector.*]—See BANKRUPTCY AND INSOLVENCY, 1.

See SETTLED ESTATES ACT—EXECUTORS AND ADMINISTRATORS.

**ESTATE TAIL.**

See WILL, 5.

**ESTOPPEL.**

See CHOSE IN ACTION—ESTATE—MUNICIPAL CORPORATIONS, 3.

**EVIDENCE.**

*Admission of new evidence on appeal—Divisional Court—Cons. R. 585.*]—On the argument of an appeal to the Divisional Court from the trial Judge where a by-law of the city of Toronto had been proved at the trial, but evidence was not given of the registration of the same, evidence was tendered on the argument of the appeal shewing the fact and date of the registration of the by-law:—

*Held*, that the evidence should properly be admitted. *Burfoot v. DuMoulin*, 583.

*Competency of defendant.*]—See CONSTITUTIONAL LAW, 3.

*Alibi.*]—See EXTRADITION, 1, 2.

*Admissibility of.*]—See SURVEY—CRIMINAL LAW, 2.

See DEFAMATION, 3—FRAUDULENT CONVEYANCES, 1—HUSBAND AND WIFE, 4—LAND TITLES ACT—PARTNERSHIP, 3.

**EXCHANGE.**

*Of land.*—See SALE OF LAND, 2, 4.

**EXECUTION.**

*Right of sheriff to interplead.*—See INTERPLEADER.

*Equitable—Right to enforce.*—See COVENANT.

See FIXTURES—FRAUDULENT CONVEYANCES, 2.

**EXECUTORS AND ADMINISTRATORS.**

*Right of retainer—Devolution of Estates Act—Assignment for creditors*—R. S. O. ch. 124—Sec. 19, sub-sec. 4, sec. 20, sub-sec. 4.]—Under their father's will, two of his sons were to receive a share of the proceeds of certain land to be sold on the death of his widow, who was still alive. They also owed the testator a certain debt, which, by the will, was to be payable in five yearly instalments from the time of his death.

About two years subsequent thereto the sons made an assignment for the benefit of their creditors under R. S. O. ch. 124.

*Held*, (1) that the effect of the assignment was by virtue of sec. 20, sub-sec. 4, of that Act, to accelerate payment of the debt due to the estate. (2) That the executors, being also the trustees of the land of which the sons were to receive shares when sold under the will, held security for their claim within the meaning of that Act, having (because of the Devolution of Estates Act) the right to impound the sons' shares under the will as against their

debt to the estate. This security the executors and trustees should value pursuant to R. S. O. ch. 124. *Tillie v. Springer*, 585.

**EXPROPRIATION.**

*Of land.*—See RAILWAYS AND RAILWAY COMPANIES, 1, 3.

**EXTRADITION.**

1. *Evidence—Alibi—Identity—Extradition Judge—Junior Judge of County Court*—R. S. C. ch. 142, sec. 6, sub-sec. 2, directory—*Forgery—Information—Variance from proof—Christian name of endorser*—R. S. C. ch. 174, secs. 57, 58, 70—*Reading over foreign depositions to prisoner.*]—Where evidence is given by the prosecution before an extradition Judge positively identifying the prisoner, the Judge cannot receive evidence on behalf of the prisoner to shew an *alibi*; for that would be in effect trying the guilt or innocence of the prisoner; if the evidence given by the prosecution is sufficient to justify the committal of the prisoner, he must be committed under sec. 11 of the Extradition Act, R. S. C. ch. 142.

*Semble*, that a prisoner is entitled to go into evidence to disprove his identity; but that means his identity with the person named in the warrant, not his identity with the person who actually committed the extradition crime.

The Junior Judge of a County Court is "a Judge of a County Court," and has the functions of an extradition Judge.

*Re Parker*, 19 O. R. 612, followed.

R. S. C. ch. 142, sec. 6, sub-sec. 2 is directory only; and the neglect of a Judge to forward to the Minister of Justice a report of the issue of a warrant, as required by the sub-section, is not a ground for the discharge of the prisoner.

The information upon which a warrant issued committing a person to await extradition for forgery, stated the Christian name of the endorser of the forged instrument as Albert, whereas when the instrument was proved it appeared to be James :—

*Held*, that the variance was immaterial under secs. 57 and 58 of R. S. C. ch. 174, which are made applicable to extradition proceedings by sec. 9 of R. S. C. ch. 142.

It was objected by the prisoner that certain depositions taken abroad and put in by the prosecution were not read over to the prisoner, as required by sec. 70 of R. S. C. ch. 174 :—

*Held*, that the objection was not one which as a matter of law would entitle a prisoner to be discharged; and it should not be given effect to as a matter of discretion because it was entirely technical in its character. *Re Garbutt*, 179.

2. *Junior Judge of County Court an extradition Judge—Interested witness—Corroboration—Alibi—Evidence of, admissibility.*—In extradition proceedings for forgery of a draft on a bank in the United States :—

*Held*, that a Junior Judge of a County Court of this province is an extradition Judge within the Extradition Act, R. S. C. ch. 142.

*Re Parker*, 19 O. R. 612, followed.

In extradition cases a warrant of commitment may be issued in proceedings instituted in this province ;

the previous issue of a warrant in the country demanding extradition not being essential.

*Re Caldwell*, 5 P. R. 217, followed.

In such cases evidence in support of an *alibi* should be refused.

A witness identifying the prisoner as the forger was the person who identified him at the bank when he procured the amount of the forged draft; but it did not appear that he had incurred any responsibility to the bank :—

*Held*, that no interest was shown in the witness so as to require corroboration; and further that the interest must be apparent on the face of the draft or immediately arise from the nature of the transaction or from his own acknowledgment.

*Regina v. Hagerman*, 15 O. R. 598 followed.

*Semble* in extradition cases the evidence of interested parties need not be corroborated. *Re Garbutt*, 465.

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## FENCES:

*See* RAILWAYS AND RAILWAY COMPANIES, 2.

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## FIRE INSURANCE.

*See* INSURANCE, 2.

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## FIXTURES.

*Mortgagor and mortgagee—Fi. Fa. goods—Interpleader.*—Certain machinery was placed *in situ* on land and housed with a view to the utilization of the land as a phosphate mine; and it was intended to utilize



the machinery upon the land, moving it from place to place so long as veins could be found. The soil was excavated in order to form a bed for the boiler and hoist, and the machinery was firmly attached by bolts to sleepers or skids placed on the rock bottom of the excavation; and a house was erected over the machinery, to erect which the soil was also to some extent excavated. The boiler and machinery were also fastened to the building by rods inside underneath the floor, and the smoke stack was steadied by guys fastened to the ground and to stumps in the ground:—

*Held*, that the chattels in question were fixtures and could not be removed without the consent of the mortgagee.

*Semble*, that apart from this, it was impossible to sell these fixtures under an execution against goods so long as the physical attachment to the land existed, even if the owner of the equity of redemption had the right to detach and remove them as chattels. *Rogers v. Ontario Bank*, 416.

### FORECLOSURE.

*See* COMPANY, 3—MORTGAGE — SALE OF LAND, 1.

### FOREIGN LAW.

*See* BANKS — FRAUDULENT CONVEYANCES, 2—HUSBAND AND WIFE, 1.

### FORGERY.

*Incomplete note.*—*See* CRIMINAL LAW, 3.

*See* EXTRADITION, 1, 2.

### FRATERNAL SOCIETIES.

*See* INSURANCE, 5.

### FRAUDS, STATUTE OF.

*See* HUSBAND AND WIFE, 1.

### FRAUDULENT CONVEYANCES.

1. *Conveyance to wife of property purchased by husband—Presumption—Subsequent conveyance by wife—Right of wife's creditors to set aside as fraudulent.*—Whether a conveyance to a wife of property purchased with the money of the husband is a gift to the wife, is a question of fact, as to which there is no presumption, at any rate in the lifetime of the parties.

Although the object with which a conveyance of property is placed in the name of another may be to protect it against the creditors of the actual purchaser, yet the property belongs to such purchaser, and if in an action to have the grantee in such a conveyance declared a trustee for the true owner, the grantee does not choose to raise such a defence, the plaintiff will be entitled to judgment.

The grantee having no interest in the property may convey it to the true owner at any time, and creditors of the former have no right to have the conveyance set aside to obtain that which does not really belong to their debtor.

*Johnston v. Cline*, 16 O. R. 129, dissented from.

*Day v. Day*, 17 A. R. 157, specially referred to.

Decision of *FALCONBRIDGE, J.*, reversed. *Gibbons v. Tomlinson*, 489.

2. *Land in foreign country—Absence of remedy there—Action to set aside here.*]—An action will not lie in this province by a judgment creditor to set aside, as fraudulent, a conveyance made by his debtor of lands situate in a foreign country, when the creditor has no remedy there, although all the parties reside in this province.

Although the Court will interfere where the parties are within the jurisdiction in some cases where fraud exists in respect to specific property out of the jurisdiction, by ordering conveyances to be made to the person entitled, it will not do so when the relief sought is to subject the property to the exigencies of execution which it is powerless to enforce. *Burns et al. v. Davidson et al.*, 547.

### GARNISHMENT.

See DIVISION COURTS, 1.

### GIFT.

See HUSBAND AND WIFE, 3.

### GOODS.

See FIXTURES.

### GUARANTEE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

### HIGH COURT.

*Jurisdiction of.*]—See CONSTITUTIONAL LAW, 1.

*Transferring action to.*]—See COUNTY COURTS, 1.

### HIGHWAYS.

See WAYS.

### HORSES.

*Straying on railway track—Accident to—Absence of Municipal by-law.*]—See RAILWAYS AND RAILWAY COMPANIES, 2.

### HUSBAND AND WIFE.

1. *Foreign law—Conflict of laws—Ante-nuptial contract—Present and future property—Matrimonial domicile—Lex rei sitæ—Statute of Frauds—Signature by notary in Quebec.*]—The plaintiff's husband entered into an ante-nuptial contract in the province of Quebec with her concerning their rights and property, present and future. He subsequently moved to this province and died there intestate :—

*Held*, that this contract must govern all his property movable and immovable, though situate in this province, provided that the laws of this province relating to real property had been complied with; and that it made no difference whether the matrimonial domicile of the parties at the time of the contract and marriage was in Ontario or Quebec.

The ante-nuptial contract in question was not signed by the parties but by the notaries in their own names, they having full authority from the parties to do so :—

*Held*, that this was a sufficient signature within the Statute of Frauds to bind the parties. *Taillifer v. Taillifer*, 337.

2. *Wife's separate estate—Agreement to charge—Possessory title—Specific performance—Costs of action and reference in.*—A husband agreed to purchase certain land, and his wife, who was married to him in 1866 without any marriage settlement, and had acquired real estate in 1870 under a deed to her, her heirs and assigns "to and for her and their sole and only use forever," joined in the agreement for the purpose of securing its being carried out and charged her land with a portion of the purchase money:—

*Held*, that the wife's land was separate estate and was properly charged.

In an action for specific performance by a vendor, whose title was, to the knowledge of the purchaser, a possessory one of long standing, in conformity with a family arrangement, ample proof thereof having been offered before action, the vendor was held entitled to his costs of action and of proving his title in the Master's office.

*Games v. Bonnor*, 33 W. R. 64, followed. *Brady v. Walls*, 17 Gr. 699, and *Re Boustead & Warwick*, 12 O. R. 488, specially referred to. *Dame v. Slater et al.*, 375.

3. *Separate estate—R. S. O. ch. 132, secs. 3, 10, 13—Money in savings bank—Gift by husband—Fraction of day.*—Subsequently to the coming into force of the "Married Woman's Property Act," R. S. O. ch. 132, a married woman on the day of entering into a money bond deposited in her own name in a savings bank a sum of money, which the evidence shewed had been given to her by her husband, but of which as against him, she had the absolute disposal by his consent and wish:—

*Held*, that this was sufficient on

which to found a proprietary judgment against her, though it was not shewn that the bond was not executed at an earlier hour than that at which the money was deposited. *Sweetland v. Neville*, 412.

4. *Alimony—Condonation of matrimonial offences—Revival of same by husband's subsequent adultery—Effect of husband's adultery—Evidence.*—Condonation of matrimonial offences is always on the condition that there shall be no repetition of any matrimonial offence in the future: and the effect of a husband's subsequent adultery is to revive previously condoned acts of cruelty.

The evidence of one witness, by confession of loose character, is not sufficient to prove adultery unless corroborated.

Proof of grave misconduct, short of adultery, by a wife will not disentitle her to alimony.

A woman both in law and in morals is justified in leaving and in refusing to return to her husband who has committed adultery; but his act which breaks up the household does not relieve him from his duty to maintain her; and proof of that offence would be sufficient upon which to award alimony. *Aldrich v. Aldrich*, 447.

*Insurance for benefit of wife and children—Apportionment by will.*—See INSURANCE, 4.

See DOWER—ESTATE—FRAUDULENT CONVEYANCES, 1.

## IDENTITY.

*Evidence of.*—See EXTRADITION, 1, 2.

**IMPROVEMENTS.**

*On land.*—See PARTITION.

**INFORMATION.**

See EXTRADITION, 1, 2.

**INJUNCTION.**

See DAMAGES, 2—RAILWAYS AND RAILWAY COMPANIES, 4.

**INSOLVENCY.**

See BANKRUPTCY AND INSOLVENCY.

**INSPECTOR.**

*Purchasing bankrupt estates.*—See BANKRUPTCY AND INSOLVENCY, 1.

**INSURANCE.**

1. *Life insurance* — “*Divisible surplus*”—“*Divisible profits*”—*Discretion of directors of company to retain profits to provide for contingencies.*—On an appeal to the Divisional Court, the judgment of FALCONBRIDGE, J., reported 20 O. R. p. 6, was affirmed.

*Per* BOYD, C.—The representation made that participating policies “would receive their equitable share of the divisible surplus,” points to the exercise of the discretion of the managers of the company, and the expression “divisible surplus” is one that refers to something less than the entire profits claimed by the plaintiff. Before divisible profits can be ascertained, it would seem to be essential for the security of policy-holders to

keep such resources in hand as would cover the whole liabilities of the company, having regard to the uncertain chances of mortality, rate of interest, expenses, etc.

*Per* MEREDITH, J.—There is no express covenant in the policy to pay the plaintiff any profits. “Divisible profits” are the profits which the company, after making, in good faith, all reasonable and proper provision for its safety and prosperity, divide among policy-holders. *Bain v. Aetna Life Ins. Co.*, 233.

2. *Life insurance* — *Benefit society*—*Change of direction as to payment*—*Trust*—*Revocation*—*R. S. O. ch. 172*—*R. S. O. ch. 136*—51 Vic. ch. 22 (O.)—A person whose life was insured in a benefit society, incorporated under R. S. O. (1877) ch. 167, as amended by 41 Vic. ch. 8, sec. 18 (O.), now R. S. O. (1887) ch. 172, on the 28th January, 1888, his first wife being then dead, caused to be issued to him a certificate making the insurance money payable to his children. After this he married again, and on the 1st June, 1889, at his request, a change was made, and a new certificate issued, making the money payable to his second wife. He died on the 19th November, 1889:—

*Held*, reversing the judgment of STREET, J., that the effect of 51 Vic. ch. 22 (O.), was to make the certificate of the 28th January, 1888, subject to the provisions of R. S. O. ch. 136, and that the rules of the society, in so far as they were inconsistent with such provisions, were modified and controlled by them; and such certificate became a trust for the children, under sec. 5 of R. S. O. ch. 136, and ceased, so long as the objects of the trust remained, to be under the control of the deceased,



except only in accordance with secs. 5 and 6, which did not authorize him to revoke the certificate and replace it by the subsequent one, *Mingeaud v. Packer et al.*, 267.

3. *Fire insurance — Application for—Materiality—Reasonableness of condition — Warranty — Fire occurring to other properties—R. S. O. (1887), ch. 167, sec. 114.*—In a form of application for fire insurance, the questions were asked: "Have you ever had any property destroyed or damaged by fire? If so, when and where?" also, "Has this risk been refused by any other company, or has any company cancelled a policy or receipt on it?" To both which questions the applicant answered "No"; and signed a memorandum at the foot of the application form, whereby he covenanted and agreed with the company that the foregoing was a just, true, and full exposition of all the facts and circumstances in regard to the situation, condition, value, and risk of the property to be insured, and that it should be held to form the basis of the liability of the company and form a part and be a condition of the insurance contract.

As a matter of fact, the insured had had other properties, but unconnected with the property now in question, destroyed by fire:—

*Held*, however, that the answer to the first of the above questions was immaterial to the risk:—

*Held*, also, that the answer to the second question was clearly a warranty, having reference as it had to the property to be insured, and the only point for the jury's decision was as to its truth. *Stott v. London and Lancashire Fire Ins. Co.*, 312.

4. *Life insurance—Insurance for benefit of wives and children—Apportionment by will—R. S. O. (1887) ch. 136—53 Vic. ch. 39, sec. 6.*—Before the coming into force of 53 Vic. ch. 39, a testator insured his life in a benefit society, payable to his wife if she survived him, if not, to his children; and also subsequently insured his life in another similar society, payable to his wife and children. After the coming into force of the above Act, he made his will, bequeathing to his wife one-half of his life policies for her life and widowhood; and, after her decease, to his children in equal proportions:—

*Held*, that R. S. O. (1887), ch. 136, sec. 6, the "Act to Secure to Wives and Children the Benefit of Life Insurance," as amended by 51 Vic. ch. 22, sec. 3, and 53 Vic. ch. 39, sec. 6, applied; and that the wife was entitled to one-half of the sum payable under the policy first mentioned for life, and the other moiety, being untouched by the will, went to her absolutely; while as to the other insurance, she was entitled to one-half for life or widowhood by virtue of the will. *Re Cameron, Mason v. Cameron*, 634.

5. *Accident insurance—Fraternal societies—Insurance Act, R. S. C. ch. 124, secs. 49, 43—Conviction.*—The defendant with the alleged object of starting a branch of a society, called the "International Fraternal Alliance," having its head office in the United States, while in this province induced a number of persons to make application for membership therein, and to pay a joining fee of \$5, which in addition to certain alleged social benefits entitled a member on application therefor, and on payment of certain

fees, to pecuniary benefits, namely, a certificate entitling the member to a weekly payment in case of sickness or accident and certain other sums in case of death or after a stated period. The defendant gave the applicants a receipt acknowledging the payment of the \$5 for, as stated, the purposes mentioned in an agreement written thereunder, namely, to forward to the head office the application on signature thereof, and if declined to return amount paid; but, if accepted, the payer was constituted a member, etc., entitled to the full benefits of all social, etc., advantages; and thereafter might secure all the pecuniary benefits on application therefor:—

*Held*, that the defendant was carrying on the business of accident insurance without having obtained the necessary license therefor contrary to section 49 of the Insurance Act, R. S. C. ch. 124; and that no protection was afforded by section 43, relating to fraternal, etc., societies, the scheme not being an insurance of the lives of the members exclusively; and the conviction therefor of the defendant for carrying on such business was therefore affirmed. *Regina v. Stapleton*, 679.

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### INTEREST.

*Arrears of—Rate of.*]—See LIMITATION OF ACTIONS, 1.

*On purchase money.*]—See VENDOR AND PURCHASER, 1, 2.

See DIVISION COURTS, 4—SALE OF LAND, 4.

### INTERPLEADER.

*Prohibition—County Court—Interpleader order—Rule 1141 (a)—Sheriff—Money paid under execution—Claim for exemption—Issue between execution creditor and execution debtor.*]—A sheriff seized and sold under an execution goods of the plaintiff which the latter claimed as exempt from seizure to the extent of \$100, as being implements of trade, and brought an action against the sheriff in a County Court to recover \$100. While the action was pending and the sheriff still had the proceeds of sale in his hands he applied to the Judge of the County Court for an interpleader order which was made, directing an issue between the plaintiff and the execution creditors:—

*Held*, on a motion by the execution creditors for prohibition, that notwithstanding that the defendant was a sheriff, and that the money in his hands was made by him as sheriff under execution, he was entitled to the benefit of Rule 1141 (a) if the facts before the Judge satisfied him that the case was within that Rule; and the Judge having jurisdiction, and the interpleader order being a proceeding in the suit the Court could not interfere. *Re Gould v. Hope*, 624.

See FIXTURES.

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### INTOXICATING LIQUORS.

1. *Liquor License Act—R. S. O. ch. 194—Police Magistrate—Right to try county offences.*]—The defendant was charged with a breach of “The Liquor License Act,” in the township of Barton in the county of Wentworth; and was tried and convicted at the city of Hamilton, situ-

ated in the said county, before the police magistrate thereof :—

*Held*, that under section 18 of the Police Magistrates' Act, R. S. O. ch. 72, the police magistrate had jurisdiction in the premises. *Regina v. Gully*, 219.

2. *Liquor License Act, R. S. O. ch. 194, secs. 49, 50, 52—Lawful sale by druggist—Omission to enter in book, effect of.*—The non-entry in a book of a lawful sale of liquor by a druggist, pursuant to sec. 52 of R. S. O. ch. 194, does not constitute an absolute contravention of the Act; but merely throws on the defendant the onus of clearly rebutting the presumption which the statute has raised against him. *Regina v. Elborne*, 504.

[Reversed on Appeal.]

[See now 55 Vic. ch. 51, sec. 7 (O).]

3. *Selling without license—Evidence of purchase of day's receipts—Costs.*—The defendant purchased for \$25, from a duly licensed hotel-keeper, the day's receipts of the bar, and at the close of the day had paid over to him such receipts :—

*Held*, that a conviction against defendant for selling liquor without a license could not be maintained, and the conviction was quashed, but without costs.

Remarks on the question of costs in such cases. *Regina v. Westlake*, 619.

4. *License Commissioners—Power to pass resolutions fixing hours for sale of liquor—R. S. O. ch. 194, secs. 4, 32, 54—Notice of motion—Power to quash.*—License commissioners, appointed under R. S. O. ch. 194, on 17th April, passed a resolution providing that, after 1st May following, in all places where intoxicating

liquors are or may be sold by whole-sale or retail, etc., no such sale or disposal of the same shall take place therein, etc., between midnight and 5 a.m., which was subsequently amended by substituting 11 p.m. for midnight :—

*Held*, that under section 4 enabling the license commissioners to pass resolutions for regulating taverns and shops, there was power to pass the resolutions here; and that such power was not interfered with by sections 32 and 54, no by-laws on the subject having been passed by the municipal council.

*Quære*, whether there is power on notice of motion to quash resolutions of this kind.

*Daniels v. Municipal Council of Burford*, 10 U. C. R. 478; *Cæsar v. Municipality of Cartwright*, 12 U. C. R. 341, commented on. *McGill v. License Commissioners of the City of Brantford*, 665.

5. *Liquor License Act—License Commissioner taking part in trial—Evidence of—Seat on platform—Provision for distress in conviction and not in adjudication—Sale to lodger during prohibited hours.*—During the trial of an offence under the Liquor License Act the license commissioner, who was sitting at the counsel's table, went and sat in the constable's chair a few feet distant from the desk at which the magistrate was sitting, but there was no evidence to shew that he in any way improperly interfered in the trial :—

*Held*, that the license commissioner could not be deemed, under the circumstances, to have been sitting on the bench and taking part in the trial, etc., contrary to sec. 95 of the Act.

An objection that the adjudication



did not provide for distress, while the conviction contained such a provision, was overruled following *Regina v. Hartley*, 20 O. R. 481.

*Held*, also, that secs. 54, 58 do not authorize the sale of liquor to a lodger in the licensee's house during prohibited hours ; the most that can be said is that the sale to the lodger does not thereby make him an offender. *Regina v. Southwick* (two cases), 670.

*Breach of Liquor License Act—Competency of defendant to give evidence.*]—See CONSTITUTIONAL LAW, 3.

### JUDGE.

*Junior—County Court—Extradition Judge*]—See EXTRADITION, 1, 2.

*County Judge—Jurisdiction of.*]—See RAILWAYS AND RAILWAY COMPANIES, 3.

*Discretion of.*]—See MALICIOUS ARREST AND PROSECUTION, 2.

### JUDGMENT.

*Judge reserving without fixing day.*]—See DIVISION COURTS, 1, 3, 4.

### JURISDICTION.

*High Court.*]—See CONSTITUTIONAL LAW, 2.

*Master-in-Chambers.*]—See MUNICIPAL CORPORATIONS, 1.

*County Judge.*]—See RAILWAYS AND RAILWAY COMPANIES, 3.

See COUNTY COURTS — DIVISION COURTS.

### JURY.

*Finding of—Effect of.*]—See MALICIOUS ARREST AND PROSECUTION, 1.

### LAND.

*Title to.*]—See ESTATE.

*Compensation for.*]—See RAILWAYS AND RAILWAY COMPANIES, 1.

*Expropriation of—Deviation.*]—See RAILWAYS AND RAILWAY COMPANIES, 3.

*Exchange of.*]—See SALE OF LAND, 2, 4.

### LANDLORD AND TENANT.

1. *Clandestine removal of goods by tenant*—11 Geo. II., ch. 19—*Counsel's advice—Reasonable and probable cause—Action for malicious prosecution.*]—A tenant is not liable to prosecution under 11 Geo. II., ch. 19, for the fraudulent and clandestine removal of goods from the demised premises, unless such goods are his own property, nor can goods which are not the tenant's property be distrained off the premises.

In an action for malicious prosecution, the jury having found the facts in dispute, the question of reasonable and probable cause is for the Judge.

Where a prosecutor has *bonâ fide* taken and acted upon the opinion of counsel in the proceedings taken by him, laying all the facts of the case fully and fairly before such counsel, this is itself evidence to prove rea-



sonable and probable cause. *Martin v. Hutchinson*, 388.

2. *Overholding Tenants*—*R. S. O. ch. 144, sec. 6*—*Motion to reverse finding of County Judge—Proper Court in which to move.*—An application under section 6 of the Overholding Tenants' Acts, may be properly made to the Divisional Court; and *Seemle*, it is the only Court in which the motion can be made. *Re Scottish Ontario and Manitoba Land Company, etc.*, 676.

See LIMITATION OF ACTIONS, 2.—  
SETTLED ESTATES ACT.

### LAND TITLES' ACT.

*R. S. O. ch. 116, sec. 23, sub-sec. 5*—*Evidence—Woman past child-bearing—Registration.*—Land was devised to the petitioner for life, with remainder in fee to her children surviving her. At the age of fifty-six the petitioner and one of her children, all the other surviving children having conveyed their shares to her, applied under the Land Titles' Act, *R. S. O. ch. 116*, to be registered as owners with absolute title.

The petitioner's monthly periods began at the age of eleven; she was married in her twenty-second year, and bore children rapidly till her thirty-sixth year, when her tenth child was born; five months after this her periods, having regularly continued, suddenly ceased, and up to the time of the application had never returned.

The evidence of a physician who had made a medical examination of the petitioner shewed that senile atrophy of the uterus and ovaries had proceeded so far that it would

be a moral impossibility for pregnancy to take place:—

*Held*, having regard to the provisions of *sec. 23, sub-sec. 5*, of the Act, that the Master should have accepted the evidence as sufficient proof that the petitioner was physically incapable of child-bearing, and should have acted upon it by granting the registration. *Re G—*—, 109.

### LARCENY.

See MALICIOUS ARREST AND PROSECUTION, 1.

### LIBEL.

See DEFAMATION.

### LICENSE COMMISSIONERS.

*Power of.*—See INTOXICATING LIQUORS, 3, 4, 5.

### LIEN.

*Mechanics' lien—Form of—Omission of name and residence of person on whose credit work done—Demurrer—Costs.*—The omission from the registered claim of lien of the name and residence of the person for whom or upon whose credit the work is done or materials furnished, provided for by section 16 of the Mechanics' Lien Act, *R. S. O. ch. 126*, is fatal to the lien.

The objection can be taken by a contractor as against a sub-contractor; and as in this action it might have been raised by a demurrer, the costs of defence were given as of a successful demurrer, to be set off

against the costs of a judgment on the pleadings for an admitted debt. *Wallis v. Skain et al.*, 532.

## LIFE INSURANCE.

See INSURANCE, 1, 2, 4.

## LIMITATION OF ACTIONS.

1. *Mortgagor and mortgagee—Vacant land—Constructive possession of mortgagee—Statute of Limitations—Presumption of payment—Arrears of interest—R. S. O. ch. 111, sec. 17—Redemption—Rate of interest post diem.*]—Where a right of entry has accrued to a mortgagee without actual entry by him, and the mortgaged lands are subsequently left vacant before a title by possession has been acquired, by anyone, the constructive possession thereof is in the mortgagee, and the Statute of Limitations does not run against him so as to extinguish his title to the lands; the mortgage being in default and no presumption of payment arising.

An action of trespass to vacant lands will lie by the mortgagee thereof.

In such an action, after the lands had been vacant for many years, and the mortgagee had then made an actual entry and was subsequently dispossessed, and the lands taken by a railway company for the purposes of their undertaking, he was held entitled to recover the value of the land as damages, to be held by him as security for his mortgage moneys, the mortgagor being entitled to redeem in respect of the damages as he would have been in respect of the land.

R. S. O. ch. 111, sec. 17, which provides that no more than six years' arrears of interest upon money charged upon land shall be recoverable, only applies where a mortgagee is seeking to enforce payment, out of the lands, of his mortgage money and interest, and does not apply to an action for redemption or to actions similar in principle.

In this action the mortgagee was held entitled to interest at the rate fixed by the mortgages up to the maturity thereof, and afterwards at the rate of six per cent.; in all for about sixteen years.

Decision of STREET, J., varied. *Delaney v. Canadian Pacific R. W. Co. et al* 11.

2. *Statute of Limitations—Possession of land—Tenancy—Payment of taxes—Owners putting up new fence—Entry—Resumption of possession—Acts of possession—Sufficiency of—Summer crops—Drawing manure in winter—Vacant possession in winter.*]—In 1857 or 1858 J. entered upon the land in question in this action as tenant to the true owners, upon the terms that he should pay the taxes, and he cultivated the land during his occupation. In the autumn of 1864 he gave up the place to the plaintiff, who paid him something for improvements; and in the spring of 1865 the plaintiff began to work upon it, living upon and occupying an adjoining lot of land, separated by a fence. The plaintiff disclaimed any knowledge of J.'s tenancy, and alleged that he entered as a purchaser of J.'s rights as a squatter, with the intention of acquiring a title by possession. In 1868 the true owners pulled down an old fence and put up a new one upon part of the land in question. In 1877 the plaintiff executed a

writing under seal, whereby he agreed to lease the land from the true owners, and to pay as rent the taxes thereon and to give up possession when requested. From the time the plaintiff bought out J. till 1884, when he ceased to use or occupy the land, he grew crops and vegetables upon it in the summer and did nothing at all in the winter except draw manure upon it, which he spread in the spring:—

*Held*, following *Finch v. Gilray*, 16 A. R. 484, that the mere fact that the plaintiff paid the taxes was not sufficient to keep the right of the owners alive against him; but what was done by the owners in 1868 was an entry upon the land in the capacity of owners, an assertion of their rights as such, and a resumption of possession for the time being, before the statute then in force had given a title to the plaintiff, and it furnished a new starting point; and, further, that what the plaintiff did upon the land did not shew such a possession as entitled him to assert that he had acquired a title as against the true owners.

The acts done in the winter did not constitute an occupation of the property to the exclusion of the rights of the true owners, but were mere acts of trespass, covering necessarily but a very short portion of the winter; and, as the possession must be taken to have been vacant for the remainder of it, the right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken again in the spring by the plaintiff. *Coffin v. North American Land Co. et al.*, 80.

3. *Payment by party not interested to mortgagee—Real Property Limitation Act—R. S. O. ch. 111, sec. 23.*]—A payment to a mortgagee under section 23 of the “Real Property Limitations Act,” or an acknowledgment of the right thereto by a person who, at the time of such payment or acknowledgment, is not liable for the payment of the mortgage money, or interested in the mortgaged property, will not enure to the benefit of the mortgagee so as to prevent the running of the statute against him. *Trust and Loan Company of Canada v. Stevenson et al.*, 571.

*Compensation—Right to.*]—See RAILWAYS AND RAILWAY COMPANIES, 1.

*Indemnity.*]—See RAILWAYS AND RAILWAY COMPANIES, 4.

*Prescriptive right.*]—See WATER AND WATERCOURSES.

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## LIQUIDATION.

*See* COMPANY.

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## LIQUORS.

*See* INTOXICATING LIQUORS.

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## LIVERY STABLES.

*Requisites of license as to.*]—See MUNICIPAL CORPORATIONS, 7.

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## LOCAL IMPROVEMENTS.

*See* SALE OF LAND, 3.



## LOCAL LEGISLATURES.

*Powers of.*]—See CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS, 1.

## LODGER.

*Sale of liquor to.*]—See INTOXICATING LIQUORS, 5.

## MALICIOUS ARREST AND PROSECUTION.

1. *False arrest—Malicious prosecution—R. S. C. ch. 164, sec. 50—Larceny—R. S. C. ch. 174, sec. 25—Apprehension without warrant—Finding of jury.*]—Plaintiff who was acting as a bailiff under a landlord's warrant to distrain for rent attempted to remove some grain which had been previously seized by a sheriff under an execution, and while in the act was arrested by the sheriff's officer who was also a county constable. He was committed for trial and was tried but acquitted.

In an action for false arrest and malicious prosecution :—

*Held* that the grain was properly under lawful seizure and in the custody of the law and that by R. S. C. ch. 164, sec. 50, anyone taking it away without lawful authority was guilty of larceny, and that by R. S. C. ch. 174, section 25, anyone found committing such an offence might be apprehended without a warrant and forthwith taken before a justice of the peace, and that the finding of the jury that the defendant acted as a sheriff's bailiff and not as a constable was immaterial, as it was incumbent on any bystander to do as he did; and the action was dismissed with costs. *Beatty v. Rumble et al.*, 184.

2 *Evidence—Malicious prosecution—Police officers' privilege—Disclosure of information—Discretion of Judge.*]—In an action for malicious prosecution against two police officers, the defendants declined on examination for discovery, to give the name of the person from whom the information was received, on which the plaintiff was arrested and prosecuted, on the ground that it was contrary to public policy, and would obstruct the detection of crime if the name of the party informing was given :—

*Held*, that under the circumstances of this case, the defendants were bound to disclose the source of their information.

*Per* BOYD, C.—It is for the Court to decide whether the answering by subordinate officers of justice in ordinary prosecutions and causes arising thereout of any such question, would or would not in each case be injurious to the administration of justice.

*Per* MEREDITH, J.—The matter does not rest in the mere discretion of the magistrate, judge or court. The disclosure should not be compelled, without the consent of the informer, except where material to the issue, necessary for its fair trial, and for the discovery of the truth of the controversy; when higher public interest require it, and it then should be enforced.

Decision of FERGUSON, J., and the Master in Chambers, reversed. *Humphrey v. Archibald, et al.*, 553.

See LANDLORD AND TENANT, 1.

## MANDAMUS.

*Revising officer.*]—See PARLIAMENTARY ELECTIONS.



**MASTER AND SERVANT.**

*Negligence—Workmens' Compensation Act—Accident—Cause of—Conjecture—Release—Amount received from benefit society—Right to deduct.*—Action under the Workmen's Compensation for Injuries Act against a railway company by the deceased's administratrix for damages sustained through deceased's death while engaged, as alleged, in coupling defendants' cars, caused, as alleged, by his being struck by the overlopping lumber on a lumber car, through the absence of stakes in the sockets thereof. There was no direct evidence to shew how the accident happened, it being merely a matter of conjecture:—

*Held*, that the action was not maintainable.

The plaintiff was paid a sum of \$250 by a benefit insurance society in connection with the railway, though a distinct organization, of which deceased was a member. The plaintiff gave a receipt stating that the railway company was relieved from all liability. The deceased's certificate did not profess to be an insurance against accidents, and the railway company were no party to the receipt:—

*Held*, that the receipt formed no bar to the action against the defendants; nor was there any right to deduct the amount received from the benefit society from the sum the plaintiff was entitled to as damages.

*Hicks v. Newport, etc., R. W. Co.*, 4 B. & S. 403 note distinguished. *Farmer v. Grand Trunk R. W. Co.*, 299.

**MASTER IN CHAMBERS.**

*Jurisdiction to try validity of elections.*—See **MUNICIPAL CORPORATIONS**, 1.

**MECHANICS' LIEN.**

See **LIEN**.

**MISTAKE.**

See **WILL**, 2.

**MONEY.**

*Appropriation of.*—See **VENDOR AND PURCHASER**, 2.

**MORTGAGE.**

1. *Assignment of equity of redemption—Principal and surety.*—Where a mortgagor has assigned his equity of redemption, the assignee covenanting with him to pay the mortgage debt, though as between the mortgagor and the assignee the latter thus becomes primarily liable for the debt, this does not create any privity of contract between the assignee and the mortgagee; and the mortgagor cannot contend as against the mortgagee, that he has become a mere surety for the debt, and, as such, has been released by certain dealings between the mortgagee and assignee of the equity of redemption, unless such dealings constitute a new contract between them.

*Mathers v. Helliwell*, 10 Gr. 172, distinguished. *Aldous v. Hicks et al.*, 95.

2. *Covenant by trustee to pay mortgage money improperly inserted in mortgage—Mortgagee restricted to foreclosure.*—Where a party holding land as a trustee, at the request of the beneficial owners, and without any consideration to him therefor or intention to become personally lia-

ble, for the benefit of such owners executed a mortgage on the land, the mortgage without his knowledge containing a covenant to pay the mortgage debt :—

*Held*, that the covenant was not enforceable against the mortgagor personally, by the assignee of the mortgage for value without notice ; and that his remedy was restricted to foreclosure proceedings against the lands. *Patterson v. McLean*, 221.

3. *Conveyance of equity of redemption—Consideration therefor—Covenant by purchaser to pay mortgage money—Want of privity.*—Although the purchaser of the equity of redemption in a mortgaged property covenants with the mortgagor to pay the mortgage money, as the expressed consideration for the conveyance, there is no privity of contract or any implied obligation created thereby, which will enable the mortgagee to sue the purchaser for the amount. *Frontenac Loan and Investment Society v. Hysop et al.*, 577.

*To secure future endorsements.*—See COMPANY, 3.

*Bar of dower in—Rights in equity of redemption.*—See DOWER.

*Right of entry.*—See LIMITATION OF ACTIONS, 1.

*Immoral consideration.*—See SALE OF LAND, 1.

*Statement of in contract of sale—Sufficiency.*—See SALE OF LAND, 4.

See FIXTURES — LIMITATION OF ACTIONS, 1, 3—WAYS, 1.

96—VOL. XXI O.R.

## MUNICIPAL CORPORATIONS.

1. *Controverted municipal elections—Interest of mayor-elect in contract with corporation—Unsettled money claim—Master in Chambers, jurisdiction of, to try election case—Rule 30—51 Vic. ch. 2, sec. 4 (O.)—Constitutional law—Powers of Provincial Legislature.*—The defendant had a contract with the corporation of the city for the supply of iron up to the end of 1890, but on the 26th November, 1890, he wrote informing the corporation that he withdrew from his contract, and enclosing his account up to date.

On the 9th December, 1890, the then mayor of the city notified the defendant that he would be held responsible for any expense the corporation should be put to in consequence of his refusal to fulfil his contract.

On the 15th December, 1890, the city council adopted a resolution cancelling the defendant's contract and releasing him from any further obligation in connection therewith. At the same meeting a notice of reconsideration was given, which by the rules of the council had the effect of staying all action on the resolution until after reconsideration. There was no reconsideration and no subsequent meeting of the council till the 7th January, 1891, previous to which the defendant had been elected mayor for 1891. At the time of his election his account above mentioned had not been paid :—

*Held*, by the Master in Chambers, that the resolution had no direct effect to release the defendant from liability under his contract, either at law or in equity ; and, whether or not the resolution was to be considered in force, it did not touch the account, the existence of which

unpaid was sufficient to invalidate the election, under the other circumstances of the case.

The election was therefore set aside; but, although the relator had notified the electors of the objection to the defendant's qualification, the seat was not awarded to the candidate having the next largest vote, on account of the resolution of the council, which taught the electors to disregard the relator's warning; and a new election was ordered.

*Held*, by MACMAHON, J., that the Master in Chambers had, by the combined effect of Rule 30 and 51 Vic. ch. 2, sec. 4 (O.), all the powers of a judge to determine the validity of the election of the defendant, and that his determination was final; and it was within the competence of the provincial legislature to clothe the Master with such powers.

*Held*, by the Divisional Court, following the principle of the decision in *Re Wilson v. McGuire*, 2 O. R. 118, that the provincial legislature had power to invest the Master with authority to try controverted municipal election cases. *Regina ex rel. McGuire v. Birkett*, 162.

2. *By-law—Construction of sewer—Acquiring easement—R. S. O. ch. 184, sec. 479, sub-sec. 15—Quashing by-law—Acting upon by-law—Estoppel—Notice to appoint arbitrator—Costs.*—Section 479, sub-sec. 15, of the Municipal Act, R. S. O. ch. 184, which gives power to a municipal corporation to pass by-laws “\* \* for entering upon, breaking up, taking or using any land \* \* ” for drainage purposes, does not authorize a by-law which, while not assuming to take land required for the purpose of a sewer, attempts to appropriate the easement for the construction thereof.

52 Vic. ch. 73, sec. 11 (O.), does not provide for the compulsory acquisition of such an easement.

The sewer in question was part of a system, but the upper end thereof, and not an outlet for any part already constructed:—

*Held*, that no money having been spent under the by-law, it had not been so acted upon as to prevent its being quashed.

The applicants for an order quashing the by-law before moving had appeared on a notice, given by them, to name an arbitrator, before a judge, who raised the objection to the by-law above referred to, whereupon the applicants gave notice of abandonment:—

*Held*, that the applicants were not estopped, but that they should have no costs. *Re Davis et al. and the City of Toronto*, 243.

3. *Municipal Act—Drainage—Arbitration—54 Vic. ch. 51 (O.)—Effect of.*—The “Act Respecting Disputes Under the Drainage Laws,” 54 Vic. ch. 51 (O.), has not the effect of abrogating pending proceedings before arbitrators who had already been appointed and had proceeded to act. *Corporation of Caradoc v. Corporation of Metcalfe*, 309.

4. *By-law prohibiting Sunday preaching in parks—Validity of—R. S. O. ch. 184, sec. 504, sub-sec. 10—Violation of constitutional right—Unreasonableness—Uncertainty—“Sabbath-day.”*—It is provided by R. S. O. ch. 184, sec. 504, sub-sec. 10, that the council of every city and town may pass by-laws for the management of the farm, park, garden, etc.:—

*Held*, that the municipal council of a city had power under this enactment to pass a by-law providing



that no person shall on the Sabbath-day in any public park, square, garden, etc., in the city, publicly preach, lecture or declaim :—

*Held*, also, that the by-law violated no constitutional right, and was not unreasonable.

*Bailey v. Williamson*, L. R. 8 Q. B. 118, followed :—

*Held*, also, that the by-law was not bad for uncertainty as to the day of the week intended, by reason of the use of the term "Sabbath-day." *Re Cribbin and City of Toronto*, 325.

5. *Chief-constable—Tenure of office during pleasure—R. S. O. (1887), ch. 184, secs. 279, 445.*]—Under R. S. O. (1887), ch. 184, sec. 445, the chief constable for the municipality can only hold office during the pleasure of the council, and this although he may have been appointed for one year by a by-law passed by the council. *Vernon v. Corporation of Smith's Falls*, 331.

6. *Drainage—Necessity for petition—Whether new work—Municipal Act, secs. 569, 585, 598.*]—On a petition therefor a by-law was passed and the usual proceedings taken for the construction of a drain from a point in the township of C. to the town line between the townships of A. and C., where it connected with an existing drain, whereupon certain landowners on the said town line petitioned the council of C. threatening that if their lands were damaged by the said drain they would hold the township of C. liable therefor, and prayed that they would order the surveyor to continue the drain to a sufficient outlet. Instructions were given to the surveyor, who made the necessary examination, and reported

in favour of a drain along the town-line; and a by-law was introduced for the construction thereof, reciting that a majority of the landowners benefited had petitioned (referring to the petition last mentioned), and assessing the cost on the lands benefited, etc., and naming the proportion thereof to be borne by the lands in A. On receiving notice of the proposed by-law the township of A. gave notice of appeal, and arbitrators were appointed. Subsequently the township of A. moved for an order of prohibition forbidding the arbitrators from further proceeding in the matter, on the ground of the absence of a proper petition for such drain :—

*Held, per STREET, J.*, that the drain in question came within either sections 569 or 598 of the Municipal Act, R. S. O. ch. 184, and not within section 585, and that a petition was an indispensable preliminary to the passing of the by-law, whereas the alleged petition was clearly insufficient: that the mere fact of its not being quashed within the period limited by section 572, would not prevent its being treated as invalid in other proceedings as here; and that prohibition would be granted, notwithstanding the by-law was good on its face, especially as there had been no laches.

On appeal to the Divisional Court the Court was equally divided, and the appeal therefore failed. *Re Corporation of Anderdon and Corporation of Colchester North*, 476.

7. *Livery-stable keeper—License to—Restrictions to places mentioned in license.*]—A person licensed to keep a livery-stable at a particular locality under a by-law made by the board of police commissioners for a city pursuant to section 436 of the



Municipal Act, but not having a cab license, for which under a separate by-law other and larger fees were payable, is not at liberty to stand with his cabs and solicit passengers at places, though owned by him, other than at the place mentioned in his license. *Regina v. Gurr*, 499.

See RAILWAYS AND RAILWAY COMPANIES, 2—WAYS, 1.

### NEGLIGENCE.

See MASTER AND SERVANT—RAILWAYS AND RAILWAY COMPANIES, 5.

### NOTARY PUBLIC.

See HUSBAND AND WIFE, 1.

### NOTICE.

*What reasonable.*—See SALE OF LAND, 2.

### NOTICE OF MOTION.

See INTOXICATING LIQUORS, 4.

### OVERHOLDING TENANTS.

See LANDLORD AND TENANT, 2.

### PARLIAMENTARY ELECTIONS.

*Mandamus*—*Revising officer*—*Electoral Franchise Act*, R. S. C. ch. 5, secs. 19, 33—*Notice of objection to names on voters' list*—*Grounds of objection*—"Not qualified"—*Validity of notice*—*Ruling of revising officer*

*upon*—*Appeal to County Judge.*—A notice under sec. 19 of the Electoral Franchise Act, R. S. C. ch. 5, as amended by 52 Vic. ch. 9, sec. 4, to a person whose name was objected to, for the purpose of having the name taken off the voters' list at the final revision, simply gave "not qualified" as the ground of objection :—

*Held*, sufficient.

The revising officer (who was not a judge) having ruled that the notice was valid, the person whose name was objected to appealed from that ruling to the County Judge, who held that the notice was invalid, and the revising officer thereupon refused to go on and hear the complaint :—

*Held*, that no appeal was given by sec. 33 of the Act from the revising officer's ruling; and therefore the proceedings before the County Judge were *coram non judice*.

A mandamus was granted. *Re Lilley and Allin*, 424.

See CONSTITUTIONAL LAW, 2.

### PARKS.

*By-law prohibiting preaching in.*—See MUNICIPAL CORPORATIONS, 4.

### PARTIES.

See SALE OF LAND, 2.

### PARTITION.

*Improvements on land*—*Tenancy in common*—*Improvements made before accrual of tenancy.*—The right of a tenant in common, in an action for partition of the property, to be paid for improvements executed by

him thereon, is restricted to such as are made by him after his tenancy in common has commenced in fact.

And where a tenant in common, in remainder, by an agreement with the tenant for life, went into possession of the property and during the life tenancy expended a large sum of money in permanent improvements at the request of the tenant for life:—

*Held*, that he was not entitled to the value of such improvements. *Lasby et al. v. Crewson et al.*, 255.

### PARTNERSHIP.

1. *Receiver—Failure of partners to agree on referee as provided in articles.*—Where partnership articles provide that on dissolution the partners shall appoint a person to collect the accounts and settle the partnership affairs, the Court will, on failure of the parties to agree on some person, appoint a receiver. *Mitchell v. Lister*, 22.

2. *One partner taking orders for his own benefit—Remedies—Account—Damages—Costs of partnership action.*—Where articles of partnership bound the parties to be just and true to each other, and to devote their time diligently to the concerns of the firm, and not to engage in any other business; and it appeared that after notice of dissolution had been given, one of the partners had taken orders on his own account to be filled by him after the termination of the partnership:—

*Held*, that his co-partner had no equity to compel him to account for the profits of the business thus done by him. The remedies in such a case are by injunction, or by action for damages.

*Dean v. McDowell*, 8 Ch. D. 345, followed.

The fact that in an action to take the accounts of a partnership, one partner has succeeded in his contention as to such accounts as against the contention of his co-partner, is not sufficient to entitle him to the costs of the action against the latter.

*Chapman v. Newell*, 14 P. R. 208, followed. *Mitchell v. Lister* (2) 318.

3. *Ostensible member of firm—Evidence.*—The defendant, who had been carrying on a general store and hardware business, sold the general business, retaining the hardware portion, taking from the vendee, to secure payment of the purchase money, a chattel mortgage thereon, the mortgage also covering future purchases. The general business continued to be carried on in a firm name, the defendant's name appearing with that of the purchaser on the same premises as before; a partition separating the hardware from the general business, but with a door leading from the one to the other, generally kept open. A certificate was registered stating that the purchaser was carrying on the general business alone under the firm name. It was ostensibly carried on under the firm name, which was the name on the sign over the door, and in the bill heads and advertisements. The plaintiffs, who had supplied goods to the defendant prior to the sale of the business, continued to supply goods, which were charged to the firm, no notice being given them that defendant was not a member thereof, while the circumstances led to the belief that he was such member:—

*Held*, that defendant was liable for the goods so supplied to the firm. *McLean v. Clark*, 683.

*Action by partner to recover share of partnership assets—Jurisdiction of County Court.* — See COUNTY COURTS, 3.

See DEFAMATION, 1.

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### PAYMENT.

*Order for payment of money—Equitable assessment—Estoppel.*]— See CHOSE IN ACTION.

*Presumption of.*]—See LIMITATION OF ACTIONS, 1.

*By party not interested.*] — See LIMITATION OF ACTIONS, 3.

*Into Court.*]—See SALE OF LAND, 3.

See INSURANCE, 2.

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### PETITION.

*For drainage—Necessity for.*]— See MUNICIPAL CORPORATIONS, 6.

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### PLAN.

*Deviation from—Expropriation of land.*]—See RAILWAYS AND RAILWAY COMPANIES, 3.

*Registration and sale under—Effect of.*]—See WAYS, 1.

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### POLICE MAGISTRATE.

*Jurisdiction of.*]—See INTOXICATING LIQUORS, 1.

### POSSESSION.

*Adverse.*]—See ESTATE.

*Of land.*]—See LIMITATION OF ACTIONS.

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### POWER OF APPOINTMENT.

*Defective appointment—Will under seal.*]—See WILL, 1.

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### PREFERENCE.

See BANKRUPTCY AND INSOLVENCY, 1, 2.

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### PRESSURE.

See BANKRUPTCY AND INSOLVENCY, 2.

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### PRINCIPAL AND SURETY.

See MORTGAGE.

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### PROCEDURE.

*For trial of provincial offences—Power of Legislature to enact.*]— See CONSTITUTIONAL LAW, 3.

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### PROHIBITION.

See CONSTITUTIONAL LAW, 2— COUNTY COURTS, 2, 3,—DIVISION COURTS—INTERPLEADER.

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### PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

## PUBLIC SCHOOLS.

1. *Roman Catholic Separate Schools—Incorporation of—Prerogative rights—Matter of form—Matter of substance—Additional accommodation—Right to form new separate schools—*49 Vic. ch. 46 (O.), secs 22, 24, 68—R. S. O. ch. 225, sec. 67—*Ib.*, ch. 227, sec. 28, sub-sec. 11.]—Six persons, Roman Catholics, some of whom were supporters of an existing Roman Catholic Separate School, No. 6, and others, Public School supporters in several adjoining Public School sections, convened a meeting for the purpose of establishing a Roman Catholic Separate School, which they thereupon assumed to do; but only three of them were residents of the same school section, and also heads of families:—

*Held*, that the requirements of 49 Vic. ch. 46 (O.), secs. 22, 24, were not complied with, and consequently there was no valid incorporation of the trustees elected at such meeting.

*Per* BOYD, C.—The creation of corporations is a prerogative act, and where the power to make them is, as in this case, delegated to private persons, the method prescribed by the legislature should be substantially followed. In such case form is of the substance, and blunder in form means invalidity.

*Held*, also, that a question as to the valid incorporation of trustees of a Roman Catholic Separate School does not come within the purview of 49 Vic. ch. 46, sec. 68 (O.), R. S. O. (1887), ch. 225, sec. 67, which presupposes incorporation.

Decision of FERGUSON, J., affirmed.

*Held*, also, *per* FERGUSON, J., that the words “or other municipal authorities” in this section, do not embrace the municipality itself.

*Held*, also, *per* MEREDITH, J., that the incorporation must be by Roman

Catholics within an existing Public School section, with the same boundaries and number as such Public School section; and, therefore, apart from the informality of the proceedings, there could be no valid incorporation here: that the relief of the dissatisfied supporters of Roman Catholic Separate School No. 6—if they were entitled to any—was in additional school accommodation under R. S. O., (1887), ch. 227, sec. 28, sub-sec. 11, and not as here sought: that no provision is made for the withdrawal of a Roman Catholic Separate School supporter from one section to support another: and that the plaintiffs’ remedy, if duly incorporated, was not in an action to recover rates collected by the defendants for others, but in proceedings to compel the collection of their rates. *Trustees of Roman Catholic Separate School Section No. 10, of Arthur v. Municipal Corporation of Arthur*, 60.

2. *Public School Board—Ratepayer applying for taxation*, R. S. O. ch. 147, sec. 42—*Rule 1229—R. S. O. ch. 225, sec. 39—Duty of auditors of school section.*]—A ratepayer of a school section is entitled, under R. S. O. ch. 147, sec. 42, to a taxation of a bill of costs rendered by a solicitor to and paid by the school board of the section, notwithstanding that the accounts of the section have been duly audited and passed under sec. 39 of R. S. O. ch. 225.

*Re Barber*, 14 M. & W. 720, distinguished.

*Ex p. Bass*, 17 L. J. Ch. 219; 2 Phil. 562; *Re Skinner*, 13 P. R. 276, 447, followed.

*Seem*, even if sec. 42 did not apply, a ratepayer would be entitled to a taxation under Rule 1229. *Re McGugan v. McGugan et al.*, 289.

[Reversed on Appeal.]



## RAILWAYS AND RAILWAY COMPANIES.

1. *Compensation for land taken—Right to, after disposal of land—Statute of Limitations.*—Where there is a right to compensation against a railway company for lands taken for railway purposes, such land forming part of lands owned by a party, the conveying away of the whole of said lands, does not of itself carry the right to the compensation.

The right to compensation is not barred until the expiration of twenty years from the time the land is entered upon and taken for the railway purposes.

*Ross v. Grand Trunk R. W. Co.*, 10 O. R. 447, followed. *Essery v. Grand Trunk R. W. Co.*, 224.

2. *Unfenced line—Horses straying from adjoining property—Non-liability*—53 Vic. ch. 28, sec. 2 (D.)—53 Vic. ch. 28, sec. 2 (D.), amending the Dominion Railway Act of 1888, enacts " \* \* and no animal allowed by law to run at large, shall be held to be improperly on a place adjoining the railway, merely for the reason that the owner or occupant of such place has not permitted it to be there."

Horses belonging to the plaintiff, while running at large, strayed from premises adjoining the defendants' line of railway where they had been without permission of the occupant, on to the railway track, which, contrary to the statute, was unfenced, and were run over by a locomotive and killed. No affirmative by-law had been passed by the local municipality permitting horses to run at large :—

*Held*, that the defendants were not liable. *Duncan v. Canadian Pacific R. W. Co.*, 355.

3. *Expropriation of land—Deviation from original plan—Necessity for plan of deviation*—R. S. O. ch. 170, sec. 10, sub-sec. 7—*Notice to treat—Offer of cash and privileges—Certificate of surveyor*—Sec. 20, sub-secs. 1 & 2—*Jurisdiction of County Judge—Injunction.*—Under "The Railway Act of Ontario," R. S. O. ch. 170, a railway company having filed an original plan shewing the location of its line and desiring to acquire other land compulsorily for the purpose of an alteration from the original location, however small the deviation may be, must file, under sub-section 7 of section 10, a plan of the proposed deviation.

*Semble*, under the Dominion Railway Act this requirement must also be observed.

The notice required by sub-section 1, and the certificate of a surveyor under sub-section 2 of section 20 of "The Railway Act of Ontario," should state in *cash* the sum which would be a fair compensation for the lands to be taken and damages.

And where a railway company without having filed any plan of a proposed deviation applied for and obtained from a County Court Judge a warrant for possession on a notice in which in addition to a sum in cash certain crossings and station privileges were offered as compensation for the land and the damages, and which was accompanied by a surveyor's certificate that the sum offered was a fair compensation therefor :—

*Held*, that the foundation of the Judge's authority to issue a warrant rested on a proper compliance by the railway company with the above sub-sections, and that he had acted herein without jurisdiction.

The High Court of Justice has power to restrain railway companies

from acting upon warrants so obtained, and it is not necessary to proceed by *certiorari*. *Brooke v. Toronto Belt Line R. W. Co.*, 401.

4. *Grand Trunk Railway—Limitation*—51 Vic. ch. 29, (D.).—Section 287 of 51 Vic. ch. 29 (D.) "The Railway Act," by which the time for bringing an action for indemnity for any damage or injury sustained by reason of the railway is extended to one year, applies to the Grand Trunk Railway Company of Canada. *Zimmer v. Grand Trunk R. W. Co.*, 628.

5. *Negligence—Accident at crossing*—51 Vic. ch. 29, sec. 256 (D.)—*Ringing bell or sounding whistle—Other precautions—Unusual danger*—51 Vic. ch. 29, sec. 260 (D.)—*Engine and tender, a "train of cars"*—"Stop, look, and listen."—In an action against a railway company for negligence, whereby the plaintiff was run over and injured by an engine and tender at a railway crossing where eight tracks crossed a public highway and where trains were continually shunting:—

*Held*, that where the company are not able to comply with the terms of section 256 of 51 Vic. ch. 29 (D.) as to ringing a bell or sounding a whistle at least eighty rods from a crossing, because the engine starts to cross within that distance, some other kind of precaution should be taken to warn the public of danger; and where, as in this case, the crossing is unusually dangerous, it is incumbent upon them to use even greater and other precautions than those required by the statute:—

*Held*, also, that an engine with tender, moving reversely, is a "train of cars" within the meaning of section 260, and some one should be

stationed on the tender to warn persons crossing the track.

The rule "stop, look, and listen," as applied by the Pennsylvania State Courts to persons about to cross a railway track, is not in force here and is not one that should be adopted. *Hollinger v. Canadian Pacific R. W. Co.*, 705.

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### RAPE.

*Commission of offence—Evidence of.*—See CRIMINAL LAW, 2.

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### REASONABLE AND PROBABLE CAUSE.

See LANDLORD AND TENANT, 1.

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### RECEIVER.

*Equitable execution.*—See COVENANT.

*Appointment by Court.*—See PARTNERSHIP, 1.

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### REGISTRATION.

See LAND TITLES ACT.

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### RELEASE.

See MASTER AND SERVANT.

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### RETAINER.

*Right of.*—See EXECUTORS AND ADMINISTRATORS.

**REVISING OFFICERS.**

*See* CONSTITUTIONAL LAW, 2 —  
PARLIAMENTARY ELECTIONS.

**ROAD.**

*See* WAYS.

**ROAD ALLOWANCE.**

*See* SURVEY.

**RULES OF COURT.**

*Rule 30.*]—*See* MUNICIPAL CORPORATIONS, 1.

*Rule 1141a.*]—*See* INTERPLEADER, 4.

*Rule 585.*]—*See* EVIDENCE.

**SALE OF GOODS.**

*Intent to defraud.*]—*See* CRIMINAL LAW, 1.

*See* DAMAGES, 2.

**SALE OF LAND.**

1. *Mortgage—Illegal contract—Immoral consideration—Knowledge of—Participation in—Possession—Foreclosure.*]—In a contract for the sale of a house, which at the time of the sale was being used for an immoral purpose, when the character of the house forms no element in the consideration paid for it, mere knowledge on the part of the vendor that the purpose to which the purchaser will probably put it is an immoral one is not sufficient to avoid the contract. There must be a consent to

or a participation in such subsequent user, or it must be shewn that the sale was for the purpose of enabling the purchaser to carry out the immoral purpose.

*Semble*, when in an illegal contract for sale a mortgage is taken back to secure the balance of the purchase money, the mortgagee, although the mortgage moneys are not recoverable, is entitled to judgment for possession and foreclosure. *Hagar v. O'Neill et al.*, 27.

2. *Specific performance—Contract—Exchange of lands—Speculative character of properties—Time—Notice to complete—Reasonable notice—Title not in plaintiff—Election to treat contract as binding—Parties—Matter of conveyance.*]—Although, where the property in a contract for the sale or exchange of lands is of a speculative character, the presumption is that time is of the essence of the agreement, such presumption may, as when a time is expressly fixed, be rebutted by the parties treating the contract as still subsisting after the time fixed for its completion. A day's notice is not a reasonable time within which to put an end to a contract so extended. To entitle a purchaser to disavow a contract on the ground that the title to the land is not in the vendor, he must repudiate promptly on discovering that fact, and if he subsequently thereto treat the contract as binding he will be held to his election and be remitted to the rights of an ordinary purchaser, including that of terminating unreasonable delay by a sufficient notice:—

*Semble*, an objection that the vendor has not the title in him, where he is in a position to enforce a conveyance of the legal estate to



him, is a matter of conveyance and not of title. *Robinson v. Harris*, 43.

3. *Contract of sale—Local improvement rates—Incumbrances—Taxes—Vendor and purchaser—Independent covenants—Equitable relief—Payment into Court.*—A contract for the sale of land provided for the payment of the purchase money in quarterly instalments; when half was paid, the vendor was to convey and give the usual statutory covenants; the purchaser was to pay taxes from the date of the contract.

In an action to recover instalments under the contract:—

*Held*, that local improvement rates imposed by municipal by-laws after, the work having been done before, the date of the contract, were incumbrances to be discharged by the vendor; but rates imposed and work done after the contract were not so.

*Re Graydon and Hammill*, 20 O. R. 199, followed.

*Les Ecclésiastiques de St. Sulpice de Montreal v. City of Montreal*, 16 S. C. R. 400, distinguished.

*Held*, also, that the covenant for payment of the instalments and the covenant against incumbrances were independent; and the vendor was entitled to judgment for the instalments; but the purchaser was entitled to shew the existence of incumbrances as an equitable ground of relief, and, the time for completion of the contract not having arrived, to pay into Court so much of his purchase money as might be necessary to protect him against the incumbrances.

*McDonald v. Murray*, 11 A. R. 101, and *Tisdale v. Dallas*, 11 C. P. 238, distinguished. *Armstrong et al. v. Auger*, 98.

4. *Vendor and purchaser—Land subject to mortgage for certain amount, at a certain rate—Rate of interest reduced on punctual payment.*—In an agreement for the exchange of land it was stated that the property “was subject to a mortgage incumbrance of \$750, bearing interest at the rate of seven per cent. per annum.” The property was one of four houses and lots, mortgaged for \$3,000, with interest at ten per cent., payable half-yearly, to be reduced if punctually paid to seven per cent., with an agreement to release each house on payment of \$750:—

*Held*, that the agreement did not convey an accurate statement as to the nature of the incumbrance. *Re Booth and McLean*, 452.

See BANKRUPTCY AND INSOLVENCY, 1—CHURCH—DAMAGES, 1—VENDOR AND PURCHASER.

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## SCHOOLS.

See PUBLIC SCHOOLS.

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## SEAL.

*Will under—Invalid deed of appointment.*—See WILL, 1.

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## SEPARATE SCHOOLS.

See PUBLIC SCHOOLS, 1.

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## SEPARATE ESTATE.

See HUSBAND AND WIFE, 2, 3.



**SERVANT.**

*See* MASTER AND SERVANT.

**SETTLED ESTATES ACT.**

*Power to grant renewable building leases—English Settled Estates Act of 1856—19 & 20 Vic. ch. 120—53 Vic. ch. 14 (O.)—“Usual custom”—Meaning of in the Province.]—In applying the English Settled Estates Act of 1856, 19 & 20 Vic. ch. 120, to this province, the words “usual custom” in section 2 must be satisfied with something less than the immemorial custom of England. It is satisfied by proof of a well recognized method or usage of framing building leases in a given locality. Under that statute and 53 Vic. ch. 14 (O.), the power to lease with extended right of renewal may be granted up to 999 years. *Re Watson’s Trusts*, 528.*

**SHARES.**

*Issue at discount.]—See* COMPANY, 2.

*Purchase of by company—Transfer to manager in trust.]—See* COMPANY, 1.

**SHERIFF.**

*Right to interplead.]—See* INTERPLEADER.

**SLANDER.**

*See* DEFAMATION.

**SOCIETIES.**

*Fraternal.]—See* INSURANCE, 5.

**SOLICITOR.**

*See* COUNTY COURTS, 2.

**SPECIFIC PERFORMANCE.**

*See* HUSBAND AND WIFE, 2—*SALE OF LAND*, 2—*VENDOR AND PURCHASER*.

**STATUTES.**

32 Hen. VIII., ch. 9.]—*See* ESTATE.

11 Geo. II., ch. 19.]—*See* LANDLORD AND TENANT 1.

9 Geo. IV., ch. 2, sec. 1.]—*See* CHURCH.

19 & 20 Vic. ch. 120.]—*See* SETTLED ESTATES ACT.

B. N. A. Act, sec. 91, sub-sec. 27.]—*See* CONSTITUTIONAL LAW, 3.

32 Vic. ch. 6, sec. 4 (O.)]—*See* COUNTY COURTS, 2.

41 Vic. ch. 8, sec. 18 (O.)]—*See* INSURANCE, 2.

49 Vic. ch. 46, secs. 22, 24, 68 (O.)]—*See* PUBLIC SCHOOLS, 1.

R. S. C. ch. 5, sec. 19.]—*See* PARLIAMENTARY ELECTIONS.

R. S. C. ch. 120, sec. 45, 53, sub-sec. 4.]—*See* BANKS—COMPANY, 3.

R. S. C. ch. 124, secs. 43, 49.]—*See* INSURANCE, 5.

R. S. C. ch. 129.]—*See* COMPANY, 2, 3.

R. S. C. ch. 142, sec. 6, sub-sec. 2.]—*See* EXTRADITION, 1.

R. S. C. ch. 164, sec. 50.]—*See* MALICIOUS ARREST AND PROSECUTION, 2.

R. S. C. ch. 165, secs. 46, 47, 50.]—*See* CRIMINAL LAW, 3.

R. S. C. ch. 173, sec. 28.]—*See* CRIMINAL LAW, 1.

R. S. C. ch. 174, secs. 25, 57, 58, 70.]—*See* EXTRADITION, 1.—MALICIOUS PROSECUTION, 1.

R. S. O. (1877), ch. 146, secs. 34, 35, 36, 37.]—*See* SURVEY.

R. S. O. (1877), ch. 152, secs. 34, 35, 36, 37, 62.]—*See* SURVEY—WAYS, 1.

R. S. O. (1877), ch. 167.]—*See* INSURANCE, 2.

R. S. O. (1887), ch. 25, secs. 10, 11.]—*See* CROWN LANDS.

R. S. O. (1887), ch. 47, sec. 19.]—*See* COUNTY COURTS, 1, 2.

R. S. O. (1887), ch. 51, sec. 144.]—*See* DIVISION COURTS, 1, 3.

R. S. O. (1887), ch. 61, sec. 9.]—*See* CONSTITUTIONAL LAW, 3.

R. S. O. (1887), ch. 67, sec. 6.]—*See* CONTEMPT OF COURT.

R. S. O. (1887), ch. 72.]—*See* INTOXICATING LIQUORS, 1.

R. S. O. (1887), ch. 103, sec. 3.]—*See* WILL, 5.

R. S. O. (1887), ch. 111, secs. 17, 23.]—*See* LIMITATION OF ACTIONS, 1, 3.

R. S. O. (1887), ch. 116, sec. 23, sub-sec. 5.]—*See* LAND TITLES ACT.

R. S. O. (1887), ch. 124, sec. 2 ; sec. 9 ; sec. 16 ; sec. 19, sub-sec. 14 ; sec. 20, sub-sec. 4.]—*See* BANKRUPTCY AND INSOLVENCY, 1, 2.—CONSTITUTIONAL LAW, 1.—EXECUTORS AND ADMINISTRATORS.

R. S. O. (1887), ch. 126, sec. 16.]—*See* LIEN.

R. S. O. (1887), ch. 132, secs. 3, 10, 13.]—*See* HUSBAND AND WIFE, 3.

R. S. O. (1887), ch. 133, secs. 5, 6.]—*See* DOWER.

R. S. O. (1887), ch. 136.]—*See* INSURANCE, 2, 4.

R. S. O. (1887), ch. 139, sec. 15.]—*See* DIVISION COURTS, 2.

R. S. O. (1887), ch. 144, sec. 6.]—*See* LANDLORD AND TENANT, 2.

R. S. O. (1887), ch. 147, sec. 42.]—*See* PUBLIC SCHOOLS, 2.

R. S. O. (1887), ch. 159.]—*See* WAYS, 2.

R. S. O. (1887), ch. 167, sec. 114.]—*See* INSURANCE, 3.

R. S. O. (1887), ch. 170, sec. 10, sub-sec. 7 ; sec. 20, sub-secs. 1, 2.]—*See* RAILWAYS AND RAILWAY COMPANIES, 3.

R. S. O. (1887), ch. 172.]—*See* INSURANCE, 2.

R. S. O. (1887), ch. 184, secs. 279, 436, 445, 479, sub-sec. 15, 504, sub-sec. 10, 569, 585, 598.]—*See* MUNICIPAL CORPORATIONS, 4, 5, 6, 7.

R. S. O. (1887), ch. 193, sec. 52.]—*See* ASSESSMENT AND TAXES.

R. S. O. (1887), ch. 194.]—*See* INTOXICATING LIQUORS.

R. S. O. (1887), ch. 225, secs. 39, 67.]—*See* PUBLIC SCHOOLS, 1, 2.

R. S. O. (1887), ch. 227, sec. 28, sub-sec. 11.]—*See* PUBLIC SCHOOLS, 1.

R. S. O. (1887), ch. 170, sec. 10, sub-sec. 7.]—*See* RAILWAYS AND RAILWAY COMPANIES, 3.

R. S. O. (1887), ch. 237, sec. 14, sub-sec. 1, 2, 3.]—*See* CHURCH.

51 Vic. ch. 2, sec. 4 (O.)]—*See* MUNICIPAL CORPORATIONS, 1.

51 Vic. ch. 22 (O.)]—*See* INSURANCE, 2, 4.

51 Vic. ch. 23, sec. 11 (O.)]—*See* DIVISION COURTS, 2.

51 Vic. ch. 29, sec. 256, 260, 287 (D.)]—*See* RAILWAYS AND RAILWAY COMPANIES, 4, 5.

52 Vic. ch. 9, sec. 4.]—*See* PARLIAMENTARY ELECTIONS.

52 Vic. ch. 43 (D.)]—*See* CONVICTION.

52 Vic. ch. 73, sec. 11, (O).]—*See* MUNICIPAL CORPORATIONS, 2.

53 Vic. ch. 14, (O).]—*See* SETTLED ESTATES ACT.

53 Vic. ch. 28, sec. 2, (D).]—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

53 Vic. ch. 39, sec. 6.]—*See* INSURANCE, 4.

53 Vic. ch. 42, (O).]—*See* WAYS, 2.

54 Vic. ch. 14, (O).]—*See* COUNTY COURTS.

54 Vic. ch. 51, (O).]—*See* MUNICIPAL CORPORATIONS, 3.

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## STREAMS.

*See* WATER AND WATERCOURSES.

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## SUBROGATION.

*See* ESTATE.

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## SUNDAY.

*Preaching in parks—By-law prohibiting.*]—*See* MUNICIPAL CORPORATIONS, 4.

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## SURETY.

*See* MORTGAGE.

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## SURVEY.

*R. S. O. (1877), ch. 146, secs. 34, 35, 36, 37 (R. S. O. ch. 152, same sections)—Road allowance between counties—Survey not conclusive—Admissibility of evidence.*]—Monuments placed in compliance with the provisions of sections 34, 35, 36 and 37 of R. S. O. (1877), ch. 146, must

be placed at the true corners, governing points or off-sets, or at the true ends of concession lines, and there is nothing in these sections making a survey thereunder or the placing of the monuments conclusive, whether right or wrong, and evidence may be received in contradiction. So held on a case reserved from General Sessions on an indictment for obstruction of a highway, being the town line between two counties.

*Tanner v. Bissell*, 21 U. C. R. 553 ; *Regina v. McGregor*, 19 C. P. 69 ; *Re Fairbairn and Sandwich East*, 32 U. C. R. 573 ; and *Boley v. McLean*, 41 U. C. R. 260, distinguished. *Regina v. Cosby*, 591.

*Certificate of surveyor.*]—*See* RAILWAY AND RAILWAYS COMPANIES, 3.

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## TAVERNS.

*See* INTOXICATING LIQUORS.

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## TAXATION OF COSTS.

*Right of ratepayer to, of School Board.*]—*See* PUBLIC SCHOOLS, 2.

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## TAXES.

*See* ASSESSMENT AND TAXES.

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## TENANT.

*See* LANDLORD AND TENANT.

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## TENANT IN COMMON.

*See* PARTITION.

**TENDER.**

*See* COMPANY, 4—WILL, 4.

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**TIMBER LICENSE.**

*See* CROWN LANDS.

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**TIME.**

*Computation of—Fraction of day.*]  
—*See* HUSBAND AND WIFE, 3.

*What reasonable notice of putting end to contract.*]*—See* SALE OF LAND, 2.

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**TITLE.**

*See* ESTATE—SALE OF LAND, 2.

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**TRUST.**

*Covenant by trustee improperly inserted in mortgage—Restriction to foreclosure.*]*—See* MORTGAGE, 2.

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES—INSURANCE, 2.

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**VENDOR AND PURCHASER.**

1. *Specific performance—Interest on purchase money—Prior action to rescind contract—Suspension of payment of interest.*]*—An agreement for the sale of land provided that the purchaser was to go into possession and into the receipt of the rents on payment of the purchase money, which was to be paid in twenty-one days from the date of the contract, and upon delivery of the conveyance, up to which events the vendor was to receive the rents, and if, from any*

*cause whatever, the price was not paid within thirty days from the contract, interest was to be paid by the purchaser. The purchase money was not paid or appropriated, and after a disagreement as to the form of the conveyance, the vendor brought an action and obtained a judgment at the trial rescinding the agreement, which judgment was afterwards reversed and the agreement restored by the Court of Appeal. In the present action, which was by the purchaser claiming specific performance and damages, the vendor was deprived of interest from the trial of his action for the rescission of the agreement until its restoration by the Court of Appeal.*

*Decision of* ROSE, J., *at the trial, varied.*

The action to rescind might be enough to disentitle the vendor to claim interest pending the action, but the purchaser claimed cross-relief in that action, which would have kept him from paying the price till it was settled: this cross-claim not being abandoned till the trial, when judgment of rescission was pronounced, the payment of interest was not suspended till the abandonment of the cross-claim.

Damages refused in addition to specific performance, they being of a speculative nature. *Hayes v. Elmsley*, 562.

2. *Possession—Payment of interest until conveyance made—Delay in completion—Appropriation of money—Interest at reduced rate.*]*—In a contract for the sale of land, where possession is taken at once and the contract stipulates for the payment of interest, the purchaser must pay interest from the date thereof, unless (1) there be unreasonable delay in the completion attributable to*



the vendor ; and (2) that there be an appropriation of the purchase money and notice thereof to the vendor.

In an action on such a contract, where the vendor was to prepare the conveyance, and the purchaser was to take possession at once and pay interest from the taking possession, and the purchaser, having taken possession, had his purchase money ready to pay over and deposited it in a bank—at first to his own credit in his general account, but afterwards to the credit of a special account—of which he gave the vendor notice, and there was a delay of over two years in preparing the conveyance:—

*Held*, that the purchaser was bound to pay interest at the legal rate up to the time he deposited the purchase money to the credit of the special account, but thereafter only at such rate as he received from the bank.

Judgment of ARMOUR, C.J., varied. *Stevenson et al. v. Davis*, 642.

*Sale of church property.*]—See CHURCH.

See SALE OF LAND.

## VOTERS' LISTS.

See CONSTITUTIONAL LAW, 2—  
PARLIAMENTARY ELECTIONS.

## WARRANT.

*Apprehension without.*]—See MALICIOUS ARREST AND PROSECUTION, 1.

## WATER AND WATERCOURSES.

*Riparian proprietors—User of stream—Reasonable user—Prescriptive right—Maintenance of dam for twenty years—Changed condi-*

*tions—Right of action.*]—Riparian proprietors are entitled to make a reasonable use of the water of a stream, to detain it and retard it within certain limits ; but any user which inflicts positive, repeated and sensible injury upon a proprietor above or below is not to be considered reasonable.

And where the defendant and his predecessor, by discontinuing the use of the water during the hard frosts, although at a loss to themselves, might have prevented the damage complained of by the plaintiff, but did not so discontinue though requested to do so by the plaintiff:—

*Held*, that they were making an unreasonable use of the water and were liable for the damage done.

The fact that the defendant and his predecessors had maintained their dam, mill and race-way in the same position for upwards of forty years, and had during all that time used the water as the necessity of their business required, did not give the defendant a right to use the water to the prejudice of the plaintiff ; the defendant could not insist that he had gained a prescriptive right to injure the plaintiff without proving that he and his predecessors had for twenty years been making an unreasonable use of the water, to the injury of the plaintiff ; the use which had formerly been reasonable becoming unreasonable because of changed conditions, within twenty years there arose for the first time a grievance which gave the plaintiff a right to complain, and he was not barred of that right by reason of his making no complaint until he began to be injured. *Ellis v. Clemens*, 227.

See MUNICIPAL CORPORATIONS, 2, 3.

## WAYS.

1. *Public Highway—Dedication by plan—R. S. O. ch. 152, sec. 62—Acceptance by user—Recall of dedication—Consent of mortgagee to plan—Repurchase of portion of property—Opening of streets by Municipal Corporation—Necessity for by-law.*—A piece of land about twenty acres in extent, fenced in, had been owned and occupied as a field by the plaintiff and his predecessors in title for twenty-five years. Before that it had, with other land lying immediately to the north on which streets had been laid out and opened up, been duly surveyed and laid out on a registered plan into lots and streets, and some lots had been sold by the then owners partly from the land now vested in the plaintiff, and partly from the land to the north of it. Subsequently the plaintiff repurchased the lots sold, except those lying to the north, and sought to restrain the defendants from opening up the streets through his lands, claiming that they were his private property:—

*Held*, by FERGUSON, J., that sec. 62 of R. S. O. ch. 152, is retrospective and applies to streets, etc., surveyed and laid out on plans made before the passing of the Act, and that the streets so laid out here were public highways; but that defendants not having passed a by-law to that effect, could not proceed to open them up.

On appeal to the Divisional Court, there being an equal division of opinion, except as to one of the streets, the appeal of the plaintiff was dismissed.

Acceptance by user and recall of dedication and consent by mortgagee discussed. *Gooderham et al. v. Corporation of Toronto*, 120.

2. *Road companies—General Road Companies' Act—Provisions as to tolls—Applicability to private road company—53 Vic. ch. 42 (O.)—Attorney-General—Right to maintain action.*—The provisions of the General Road Companies' Act, R. S. O. ch. 159, relating to tolls, taken in connection with 53 Vic. ch. 42 (O.) apply to a road company incorporated by special Act, so as to prevent the company from demanding tolls after the engineer appointed under 53 Vic. ch. 42 (O.) has reported the road to be out of repair, until he further reports that the road has been put in good and efficient repair; and an action will lie at the suit of the Attorney-General to restrain such collection.

[Reversed by the Court of Appeal.] *Attorney-General ex rel Russell et al. and Vaughan Road Co.*, 507.

*See* SURVEY.

## WIFE.

*See* HUSBAND AND WIFE.

## WILL.

1. *Power of appointment—Defective appointment—Appointment by will instead of by deed—Will under seal.*—A deed of trust provided that certain lands should go to the settlor's three children in default of appointment by deed. Afterwards he made his will, under seal, whereby he devised "all the rest of my estate, real and personal, to which I shall be entitled at the time of my decease," to one of the three children:—

*Held*, that this residuary devise could not be regarded as an execu-

tion of the power of appointment ; nor even as such a defective execution as equity would aid, at any rate at the suit of the plaintiff, who, as an illegitimate child of the testator, was only a stranger.

Decision of ROSE, J., affirmed. *Shore v. Shore*, 54.

2. *Mistake—Construction—Direction to divide in impossible fractions—Principle of construction in such cases.*]—A testator by his will directed : “When my youngest son is of the age of eighteen years, my estate shall be divided among my children then living, *i. e.*, to each of my sons I leave two-thirds, and to each of my daughters one-third, of all my estate and effects.” When the youngest son attained eighteen, there were then twelve children living, seven daughters and five sons :—

*Held*, that the most reasonable and satisfactory construction of this clause, having regard to the words used, was that each child should have a share, but that each son’s portion should be double that of a daughter.

The principle of construction in such cases of mistakes in wills is, that the “words are not corrected, but the intention, when clearly ascertained, is carried out notwithstanding the apparent difficulty caused by the particular words.” *Lasby v. Crewson*, 93.

3. *Construction—Executory devise—Death of devisee before contingency happens.*]—A testator devised his farm to his wife “to have and to hold unto my said wife until my daughter E. E. shall arrive at the age of twenty-one years. After that to my said daughter and her heirs forever, and should my said daughter die before attaining the age of twenty-one years, I give and devise the said

farm to my said wife, to have and to hold unto her and her heirs forever.” The widow died intestate before the daughter, who was the only child, and who herself died intestate and unmarried before attaining twenty-one :—

*Held*, that the widow, under the second gift to her, took an executory devise in fee, which passed upon her death to the daughter, upon whose death it passed to her proper representatives. *Re Bowey, Bowey v. Ardill*, 361.

4. *Devise—Products and services charged on land—Tender of and refusal to accept—Compensation.*]—A testator by his will devised his farm to his grandson charged with the supply of certain products and personal services in favour of a daughter and granddaughter.

On a disagreement between the parties a tender of the products and services was made and refused, and an action was brought to have them declared a charge on the land and for a money compensation :—

*Held*, that the refusal of the products did not deprive the plaintiffs of the right to recover their value but that they were not entitled to compensation for the personal services proffered and refused. *Murray et al. v. Black et al.*, 372.

5. *Devise—Estate tail—Remainder expectant thereon—Barring of estate tail—R. S. O. ch. 103, sec. 3.*]—A testator by his will devised to his son and “to the heirs of his body” a part of his real estate, and to his daughter and “to the heirs of her body” the remainder of her property, and if “either \* \* \* should die without leaving heirs of their body,” the share of the deceased to the survivor, and “to the heirs



of their body," \* \* and should both die "without leaving living issue" then over in fee simple. The daughter died in the lifetime of her brother, without issue. The son married and had living issue, and conveyed in fee:—

*Held*, that an estate tail vested in the son, and that there was nothing in the will to give the words "die without leaving living issue," the meaning of "an indefinite failure of issue," and that the ultimate remainder in fee simple expectant on the estate tail, could be barred by the son.—*Re Fraser and Bell*, 455.

6. *Construction of—Children—Grandchildren—Issue—Legacy—Period of vesting.*]

—A testator devised and bequeathed his real and personal estate to his wife for life, or until remarriage, with powers of disposal; and by a residuary clause devised the residue—not specifically devised or bequeathed and not sold or disposed of by his said wife—immediately after her death or remarriage, to his executors to sell and convert same into money, and out of the proceeds pay a specific sum to each of his five sons and to divide the balance share and share alike between his three daughters, and if his said daughters should die before him or before said distribution leaving issue the share or shares of his said daughters so dying should be divided ratably and proportionately amongst the child or children of said daughter or daughters living at the time of said distribution, so that the issue of any of his said daughters who might be dead should receive her or their parents' share. The widow survived the testator and died without having remarried. A son, C. K. R., and a daughter, M., also survived the testator, but died

prior to the widow, the son leaving no issue, and the daughter a son F. and a daughter M. C., the said last named daughter having also died leaving two children:—

*Held*, that the word *children* here must be taken in its primary sense, *i. e.*, the immediate children of the testator, and excluded grandchildren, so that F. took the whole of his mother's share to the exclusion of the children of the daughter M. C.; and that the legacy to C. K. R. became vested on testator's death, payable on the widow's death, and that his personal representatives were entitled thereto. *Rogers et al. v. Carmichael et al.*, 658.

*See* INSURANCE, 4.

## WINDING UP.

*See* COMPANY.

## WORDS.

"*Acquire.*" ]—*See* BANKS.

"*Cause or matter.*" ]—*See* DIVISION COURTS, 2.

"*Hold.*" ]—*See* BANKS.

"*May.*" ]—*See* ASSESSMENT AND TAXES, 1.

"*Not qualified.*" ]—*See* PARLIAMENTARY ELECTIONS.

"*Peremptorily closed.*" ]—*See* COMPANY, 4.

"*Personal actions.*" ]—*See* COUNTY COURTS, 2.

"*Sabbath day.*" ]—*See* MUNICIPAL CORPORATIONS, 4.

"*Usual custom.*" —*See* SETTLED ESTATES' ACT.



**WORK AND LABOUR.**

*Building contract—Dismissal of contractor—Right to remove material and plant—Demand—Conversion.*]

—By a contract for the erection of certain buildings the contractor was to supply all labour, material, apparatus, scaffolding, utensils, and cartage of every description needful for the performance of the work; and was to deliver up to the owner, the work in perfect repair, etc., when complete, and was not to sub-let any part of the works without the architect's consent; and all work and material as delivered on the premises was to form part of the works and be considered the property of the owner, and not to be removed without his consent, the contractor to have liberty to remove all surplus material after he had completed the works. Without the architect's consent the contractor entered into a sub-contract with plaintiff for the excavation, brick and masonry work, and the plaintiff commenced work under his sub-contract, and con-

tinued to work for some time when he was ordered to discontinue by the architect;—

*Held*, that the plaintiff was entitled to remove from the premises (premises meaning what the parties treated as such) material placed there after he was directed to discontinue, and also material delivered off the premises, as well as plant constituting the fixtures and the apparatus, etc., necessary for carrying on his business, or to recover from the owner the value of any material used by him in the buildings; but that plaintiff was not entitled to remove any material placed there before he was ordered to discontinue; and that no demand was necessary; it appearing that the owner was using the same and thus committing an act of conversion. *Ashfield v. Edgell et al*, 195.

**WORKMEN'S COMPENSATION FOR INJURIES ACT.**

*See* MASTER AND SERVANT.

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